

**THE WEAPONIZATION OF THE
NATIONAL ENVIRONMENTAL POL-
ICY ACT AND THE IMPLICATIONS
OF ENVIRONMENTAL LAWFARE**

OVERSIGHT HEARING

BEFORE THE

**COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES**

ONE HUNDRED FIFTEENTH CONGRESS

SECOND SESSION

Wednesday, April 25, 2018

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**OVERSIGHT HEARING ON THE WEAPON-
IZATION OF THE NATIONAL ENVIRON-
MENTAL POLICY ACT AND THE
IMPLICATIONS OF ENVIRONMENTAL
LAWFARE**

**Wednesday, April 25, 2018
U.S. House of Representatives
Committee on Natural Resources
Washington, DC**

The Committee met, pursuant to notice, at 2:14 p.m., in room 1324, Longworth House Office Building, Hon. Rob Bishop [Chairman of the Committee] presiding.

Present: Representatives Bishop, McClintock, Thompson, Tipton, LaMalfa, Cook, Westerman, Hice, Webster, Bergman, Cheney, Johnson; Grijalva, Sablan, Huffman, Lowenthal, Beyer, Gallego, Barragán, Soto, and McEachin.

The CHAIRMAN. All right. We will call this Committee meeting to order. We are here today to hear testimony on the weaponization of the National Environmental Policy Act, and implementations of environmental lawfare. Great words.

Under Committee Rule 4(f), any oral opening statements are limited to the Chairman and the Ranking Member. This will allow us to hear from witnesses sooner. Therefore, I am going to ask unanimous consent that any other Members' opening statement be part of the hearing record if it is submitted to the Subcommittee Clerk by 5:00 p.m. today.

If there are no objections, that will be so ordered.

All right, let me first recognize myself for 5 minutes, as we start this particular hearing.

**STATEMENT OF THE HON. ROB BISHOP, A REPRESENTATIVE
IN CONGRESS FROM THE STATE OF UTAH**

The CHAIRMAN. Today, this Committee is meeting to discuss the National Environmental Policy Act, a law that has been interpreted and administered far differently than Congress intended when it was created in the 1970s. It shows you what happens when we write vague and ambiguous language that can be defined not by congressional intent, but by litigation and courts and ad hoc decision making of agencies operating out of a fear of the next lawsuit for projects that are going to be large and/or small.

As a result, we have an ever-expanding coagulation—you guys actually wrote “coagulation” for me?—

[Laughter.]

The CHAIRMAN [continuing]. Coagulation of regulation, guidance, and caselaw. As it has grown, NEPA compliance has become more complex, expensive, and time-consuming for agencies and the public.

For example, we now average 5 years to prepare the average environmental impact statement. That is 675 days longer than the average was in 2000. Even an environmental impact statement will still run tens of thousands of pages and take a decade to complete. Even something shorter than that can still be in the thousands of pages, which simply means it makes a total mockery of CEQ's suggestion that complex EISs should be no longer than 300 pages. And it puts the United States at a total competitive disadvantage with other western countries.

The NEPA process that we have today is not a product of design, it is not a product of careful planning, it just kind of happened through cycles of litigation, over and over again. NEPA was never intended to be a weapon for litigants to force delays and denials on all sorts of activities with a Federal nexus. But the NEPA, as it is being implemented, provides just that.

In fact, environmental reviews should inform governments of the actions they need to take, not paralyze it. And that is what is happening today.

My hope is, with this hearing, to pause, take a step back, and examine through the witnesses' testimonies how NEPA has been weaponized by vexing litigation and begin to identify ways to restore it to its original intent.

With that, I will ask that the entire statement I have been submitted into the record under unanimous consent and yield back my time.

[The prepared statement of Mr. Bishop follows:]

PREPARED STATEMENT OF THE HON. ROB BISHOP, CHAIRMAN, COMMITTEE ON
NATURAL RESOURCES

Today, the Committee meets to discuss the National Environmental Policy Act, a law that's been interpreted and administered far differently than what Congress intended by its creation in 1970.

Due to NEPA's vague and ambiguous language, the law's purpose and administration has largely been defined not by congressional intent or agency rulemaking, but rather litigation, court rulings, and ad hoc decision making of agencies operating out of fear of the next lawsuit for projects large and small.

As a result, the NEPA process is now an ever-expanding coagulation of regulation, guidance, and caselaw. As it's grown, NEPA compliance has become more complex, expensive, and time-consuming for agencies and the public. The average environmental impact statement now takes 5 years to prepare, 675 days longer than the annual average recorded in 2000. An Environmental Impact Statement for a large-scale infrastructure project can run into the tens of thousands of pages and take a decade to complete. Even, shorter environmental assessments now routinely number in the thousands of pages. This makes a mockery of CEQ's suggestion that complex EISs be no longer than 300 pages. It also places the United States at a competitive disadvantage in comparison to other western countries like Canada, Germany, and Australia, who can complete most large environmental reviews within 2 years.

The NEPA process is not the product of deliberate design and careful planning. It is a result of legal accretion. The outcome of repeated cycles of litigation and increased regulation. It was intended by Congress to be a mechanism for inter-agency coordination. It created a framework for Federal agencies to take into consideration the significant environmental impacts of "major Federal actions." NEPA's drafters never anticipated that it would become the basis for thousands of lawsuits and administrative challenges.

Nowhere does NEPA's text provide private parties with a right to challenge agency determinations in court. It was not intended as a weapon for litigants to force delays and denials on all sorts of activities with a Federal nexus. In its current form, NEPA provides just that.

Faced with the credible threat of expensive and time-consuming litigation, agencies attempt to “bulletproof” their environmental impact statements, adding to the volume of paperwork without improving the quality of the review. “Analysis paralysis,” the seemingly never-ending search for complete information, is a common phenomenon as agencies attempt to evaluate every potential impact or hypothetical factual scenario no matter how minimal or unlikely.

Countless provisions have become law to streamline at least some aspect of the environmental review process or carve out particular classes of projects. In the executive branch, successive administrations from both parties have sought to improve NEPA failures administratively, to no avail. However, we’ve failed to address the underlying problem: the law itself.

We can both better protect the environment and allow for thorough review and processing of critical economic, energy and infrastructure activities in a timely manner. These concepts are not mutually exclusive. But it simply won’t happen unless Congress acts to clarify NEPA’s intent, scope, and limitations. Environmental reviews should inform government action, not paralyze it.

My hope with this hearing is to pause, take a step back and examine through the witnesses’ testimonies how NEPA has been weaponized by vexatious litigation and begin to identify ways to restore its original intent.

The CHAIRMAN. With that, I recognize the Ranking Member for his opening statement of up to 5 minutes. I did mine in 3 minutes; see if you can beat it.

Mr. GRIJALVA. No, mine is pretty coagulated right now. I just have to go forward with it.

[Laughter.]

The CHAIRMAN. It is damn bloody.

Mr. GRIJALVA. It is bloody.

STATEMENT OF THE HON. RAÚL M. GRIJALVA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ARIZONA

Mr. GRIJALVA. I want to thank you, Mr. Chairman, and thank you and our witnesses for taking the time to be with us today.

Here we go again: another Republican attempt to undermine the National Environmental Policy Act so that companies making big private profits on our public lands can do so more quickly.

My Republican colleagues really cranked up the misleading hearing title machine this time for this one, with “weaponization of NEPA.” To be clear, the silencers and armor-piercing bullets Republicans tried to sneak into the sportsmen’s legislation earlier this week were indeed weapons. The firearms that extremists used to take over a refuge in Oregon, those were real weapons.

The National Environmental Policy Act is not a weapon, it is a shield. NEPA requires our government to assess threats to our environment and public health through consideration of alternatives and public input. The law protects average citizens from an unthinking government, and it is NEPA that is under attack at this meeting.

This hearing will feature overheated rhetoric and unproven, irrelevant anecdotes from the Majority side. Before we get to that, I would like to lay out a couple of facts.

Every year, tens of thousands of projects and activities are subject to NEPA review. And every year, about 95 percent of these projects are handled in a matter of days through the categorical exclusion process. Less than 1 percent of these projects go through full environmental impact statements, or the EIS process. An EIS can take time, but those projects requiring an EIS are the most

complex and have the most potential to affect things like our air or water quality.

Allowing time for a careful review of these projects is warranted. And the mere fact that a project took a decade to complete is not evidence that NEPA was the cause of the delay.

Of course, the review process should move and could move much faster if the Majority would stop starving Federal agencies of the money and people they need to do their work.

Of the tens of thousands of projects and activities subject to NEPA review, only about 100 lawsuits are filed each year—100 out of more than 50,000 NEPA reviews each year. That is a small fraction of 1 percent. And that fraction of 1 percent are simply examples of citizens seeking to hold their government accountable, something I would think that my Republican colleagues would respect.

NEPA is not too burdensome and it doesn't lead to too much litigation. Our economy is thriving since NEPA was enacted, and our environment has gotten much better. NEPA is not a weapon. In the vast, dark bureaucracy of the Federal Government, NEPA pulls back the curtain and lets the sunlight stream in. If that sunlight is a weapon, as my Republican colleagues now claim, the only thing that it is killing is bacteria. We need more of that, not less of that.

With that, Mr. Chairman, I yield back.

[The prepared statement of Mr. Grijalva follows:]

PREPARED STATEMENT OF THE HON. RAÚL M. GRIJALVA, RANKING MEMBER,
COMMITTEE ON NATURAL RESOURCES

Thank you, Mr. Chairman. And thank you to our witnesses for taking the time to be with us here today.

Here we go again: another Republican attempt to undermine the National Environmental Policy Act so that companies making big, private profits on our public lands can do so more quickly.

My Republican colleagues really cranked up the misleading-hearing-title-machine for this one with "The weaponization of NEPA." To be clear, the silencers and armor-piercing bullets Republicans tried to sneak into the sportsmen legislation earlier this Congress—are weapons. The firearms that extremists used to take over a refuge in Oregon—an action most of my Republican colleagues have yet to condemn—were weapons. The National Environmental Policy Act is not a weapon—it is a shield.

NEPA requires our government to assess threats to our environment and public health through consideration of alternatives and public input. The law protects average citizens from an unthinking government—and it is NEPA that is under attack.

This hearing will feature overheated rhetoric and unproven, irrelevant anecdotes from the Majority side, so before we get to that, I'd like to lay out a couple facts. Every year, tens of thousands of projects and activities are subject to NEPA review. And every year, about 95 percent of those projects are handled in a matter of days through the Categorical Exclusion process. Less than 1 percent of these projects go through the full Environmental Impact Statement, or EIS process.

An EIS can take time, but those projects requiring an EIS are the most complex and have the most potential to affect things like our air or water quality. Allowing time for a careful review of these projects is warranted. And the mere fact that this project or that took a decade to complete is not evidence that NEPA was the cause for that delay.

Of course, the review process would move faster if Congressional Republicans would stop starving Federal agencies of the money and people they need to do their work. Of the tens of thousands of projects and activities subject to NEPA review, only about 100 lawsuits are filed each year—100 out of more than 50,000 NEPA reviews each year. That is a small fraction of 1 percent. And that fraction of 1 percent are simply examples of citizens seeking to hold their government accountable; something I would think my Republican colleagues would respect.

NEPA is not too burdensome, and it doesn't lead to too much litigation. Our economy has thrived since NEPA was enacted, and our environment has gotten cleaner.

NEPA is not a weapon. In the vast, dark bureaucracy of the Federal Government, NEPA pulls back the curtain and lets sunlight stream in. If that sunlight is a weapon—as my Republican colleagues now claim—the only thing it is killing is bacteria; we need more of that, not less.

With that, I yield back.

The CHAIRMAN. Thank you. You should have coagulated more.
[Laughter.]

The CHAIRMAN. Now we are going to turn to our Committee to talk about the vision of the 1970s versus the reality of today.

Our first witnesses are from left to right: Dr. Laura Alice Watt, a professor at Sonoma State University's Department of Geography, Environment, and Planning, and a member of the Resilient Agriculture Group—thank you for being here; Ms. Melissa Hamsher, who is the Vice President of Environmental, Health, Safety, and Regulatory at the Eclipse Resources Corporation—I appreciate you being here; Mr. Horst Greczmiel—am I close to that—who is a former Associate Director of NEPA Oversight at the Council on Environmental Policy—thank you for joining us; and then Mr. James Coleman, who is a law professor at Southern Methodist University, the Dedman School of Law.

I appreciate all four of you taking the time and effort to travel here to do this. Let me remind you that under our Committee Rules, I think you have all been here before, anything that you have written is already part of the record. This is an oral statement and is limited to 5 minutes.

The microphones in front of you have to be turned on—make sure you do that—and then turned off again.

The green light is go, the yellow light means you are about to get screwed over. And the red light—look, I will apologize to all of you here. We have to be back on the Floor right now, so I will be leaving quickly. For those of you who are here and I am still the Chairman, as soon as it hits five, I am shutting you down, regardless. Whoever replaces me in the Chair may be a little bit wimpier.

[Laughter.]

The CHAIRMAN. But for whomever is doing that, I hope not. And the only reason we do that 5 minutes is so that we can get on and make sure that you have time to answer questions from the Committee members, as well. So, I appreciate that.

We will go from left to right as I am looking at you, starting with Dr. Watt. You are recognized for 5 minutes.

**STATEMENT OF LAURA ALICE WATT, Ph.D., PROFESSOR,
DEPARTMENT OF GEOGRAPHY, ENVIRONMENT, AND PLAN-
NING, SONOMA STATE UNIVERSITY, ROHNERT PARK,
CALIFORNIA**

Dr. WATT. Good afternoon, Chairman Bishop, Ranking Member Grijalva, and members of the Committee. Thank you for inviting me to testify today about the importance of consistency and accuracy in conducting environmental review under the authority of NEPA.

I am a professor of environmental history and policy at Sonoma State and also an award-winning environmental planner, so I speak today both as a researcher and as a practitioner.

[Slide.]

Dr. WATT. I have spent 20 years researching and analyzing the history of land management by the National Park Service of historic working landscapes at the Point Reyes National Seashore in Northern California.

May I have the next slide?

[Slide.]

Dr. WATT. This work has recently been published as a book titled, "The Paradox of Preservation: Wilderness and Working Landscapes at Point Reyes National Seashore."

When Congress created the seashore in 1962, it recognized the significance of this working landscape with specific provisions to maintain the agricultural land uses within its boundary. Yet, since then, actions by Park Service officials have gradually eroded the number of working ranches at Point Reyes from 25 at the time of establishment to only 11 today.

Based on my historic research, both agency action and inaction have contributed to this decrease. Examples at both the programmatic level and the individual ranch level include the failure to update the seashore's 1980 general management plan—I think I am a little off on the slides—which would provide an over-arching vision for the seashore's management to give agency actions coherence and consistency.

This is despite starting a planning process in 1997, and actually completing a draft GMP in 2010, but that was never released to the public.

This also includes failure to manage and control an expanding population of the reintroduced tule elk, which can damage ranch fencing and infrastructure, and threaten the organic certification of many of the ranches.

Another example is the direct cancellation of several ranching permits, resulting in serious degradation of historic buildings, and increases in fire hazard from unmanaged pastures being taken over by invasive brush and weeds.

Next one.

[Slide.]

Dr. WATT. A substantial part of this erosion of the working landscape has occurred through the uneven application of NEPA by Point Reyes staff.

And the next one, please.

[Slide.]

Dr. WATT. On this chart—oops, I think we are off. One more. There we go.

[Slide.]

Dr. WATT. On this chart, the shading should line up across each row as some proposed change in land use or management triggers one or another level of NEPA review.

But as you can see, in instances involving changes in natural resource management like the wetlands restoration, NEPA review has been conducted as it should. Yet, in each case involving agricultural use, either its removal or its continuation, the agency

response with NEPA is the opposite of what it should be. NEPA has been conducted in cases where no land use change would occur, merely a continuation of existing use, and has not been conducted in instances of removing agricultural or maricultural use, even though these removals do cause change, and often substantial change, to the environment.

These are concrete examples of an agency applying NEPA inconsistently when it sees fit, apparently on the basis of whether it likes a particular program or project. These inconsistencies in NEPA are troubling. They have contributed to the uneven treatment of land uses that Congress intended should be treated equally.

Specifically, the 1962 Enabling Act contained clear congressional intent to retain the working ranches within the seashore's boundary. However, when the Park Service was granted full condemnation authority in 1970, the specific attention to agricultural lands was removed in the process. While Congress passed additional legislation in 1978 to create a procedure for ranching families to shift from reservations of use and occupancy to leases or permits, it neglected to reaffirm its originally expressed intent that working ranches remain indefinitely.

Restating this intention now by amending the seashore's enabling legislation would not only help avoid further lawsuits by groups interested in forcing ranching out, but would also provide important benchmarks for what is considered a reasonable range of alternatives for NEPA review in future planning processes.

In closing, I want to strongly advocate for the importance of environmental review, as it is often the only moment where we stop and at least consider the impacts of our actions on the human and non-human worlds around us. Yet, I also want to be an advocate for consistency and application of that review.

Agencies should not scrutinize at one level here, and an entirely different one there. The rigor of NEPA review and, indeed, whether it is done at all, cannot merely turn on an agency's preference, but must serve to implement congressional intent for management of all resources. Thank you.

[The prepared statement of Dr. Watt follows:]

PREPARED STATEMENT OF DR. LAURA ALICE WATT, PROFESSOR, DEPARTMENT OF GEOGRAPHY, ENVIRONMENT, AND PLANNING, GRADUATE COORDINATOR, CULTURAL RESOURCES MANAGEMENT MASTERS PROGRAM, SONOMA STATE UNIVERSITY

Good afternoon Chairman Bishop, Ranking Member Grijalva, and members of the Committee. Thank you for inviting me to testify before the Natural Resources Committee today about the importance of consistency and accuracy in conducting environmental review under the authority of the National Environmental Policy Act, or NEPA. For the past 12 years I have been a professor at Sonoma State, teaching environmental planning as well as environmental history and policy. Prior to taking this academic post, I spent 4 years working as an environmental planner for EDAW, Inc., in San Francisco, primarily contracted to write 20-year Resource Management Plans for several northern California BLM offices, one of which—our RMP for the King Range National Conservation Area—won an award for “NEPA Excellence” from the National Association of Environmental Professionals. Hence I am speaking today about NEPA from my experiences both as a researcher and a practitioner.

And before agreeing to testify, I took several days to consider this invitation, as I am concerned that some Members of Congress might be looking for information that could be used to weaken environmental regulations and review—as a life-long Democrat and dedicated environmental studies scholar, I would not want to contribute to such an effort. But I have decided to have faith that good information and insight will benefit environmental planning processes, rather than cause additional problems. So I am here today in the spirit of collaboration, and not as a partisan, to discuss the importance of consistency, accuracy, and fairness in agencies' application of NEPA.

Specifically, I would like to tell you about a subject to which I have devoted some two decades of academic research and analysis: the history of land management by the National Park Service of the historic, working landscapes at the Point Reyes National Seashore (PRNS) and the Golden Gate National Recreation Area (GGNRA)'s northern district. This work resulted in the 2017 publication by the University of California Press of my book *The Paradox of Preservation: Wilderness and Working Landscapes at Point Reyes National Seashore*. Earlier this month, I updated my findings, based on developments since my book was published, in a presentation to the annual conference of the Association of American Geographers.

What is now Point Reyes National Seashore has always been a stunning natural environment: A dark evergreen forest covers the spine of Inverness Ridge running up the eastern side of the peninsula, contrasting with the pale greens, golds, and grays of the more open hillsides that tumble down its western side to the ocean's edge. A typical day may bring bright sunshine in the morning, turning to dense fog and howling ocean winds by afternoon. But it has also been a working landscape for centuries. The native Coast Miwok actively managed this landscape through burning and other methods, to maintain open grasslands and encourage the species that rely on them. Since its earliest settlement by non-native residents—first Mexican rancheros in the 1830s, followed by northeastern dairiers in the 1850s—West Marin has been a place of pastoral beauty, an unexpected meeting of the wild Pacific Ocean with wide expanses of green pastures and white victorian ranches. Many of the families working the land have roots that go back four, five, or six generations, stemming from several groups of European immigrants who together form the region's distinctive character.

Congress recognized the significance of this working landscape when it created the Seashore in 1962, with specific provisions to maintain the agricultural land uses within its boundary. Yet since the Seashore's establishment, actions by PRNS officials have consistently eroded the number of working ranches at Point Reyes—from 25 on the Point Reyes Peninsula at the time of establishment, to 11 today. On the lands owned by the GGNRA but managed by PRNS, the number of working ranches has dropped from 19 in 1972 to 8 today, with 6 additional ranch parcels leased for grazing. Based on my field research, this is a result of both agency intention and neglect. Examples, both programmatic and at the individual ranch level, abound, and include:

- Failure (continuing to today) to update the 1980 General Management Plan (despite completing a Draft GMP in 2010 that was never released to the public) to provide an over-arching vision for the Seashore's management;
- Failure to manage and control the (re-introduced) tule elk population so that it does not damage ranch fencing and infrastructure, and threaten the organic certification of many of the ranches; and
- Pushing several permittees to discontinue ranching and accede to the cancellation of their permits, resulting in serious degradation of historic buildings and increases in fire hazard from unmanaged pastures being taken over by invasive brush and weeds.

A substantial part of this erosion of the working landscape has occurred through the inconsistent application of NEPA by PRNS staff. I will describe a few examples, and urge the Committee to refer to the chart below showing inconsistencies over time:

- All ranches shifted from Reservations of Use and Occupancy (RUOs) to agricultural leases or special use permits in the early 1990s (except Kehoe, 10 years later) with no environmental review; documents indicate these changes either being categorically excluded or tiering off 1980 GMP. This makes sense, because there was no change in land use or management, just a continuation of the status quo. Yet when Drakes Bay Oyster Company (DBOC, formerly Johnson's) anticipated shifting from a RUO to a special use permit in 2012, this change was deemed to require an Environmental Impact Statement (EIS), which was completed without a true no-action alternative—in the sense that a no-action alternative should analyze the continuation of present management—and with what the National Academy of Sciences found were serious and material scientific deficiencies.
- Two ranch permits were canceled in 2000/01 (Horick at D Ranch and Tiscornia at Rancho Baulines), but no environmental review was conducted, despite a major change in land use by removing an operating ranch and allowing, over time, proliferation of non-native vegetation—with dangerously increased risk of wildfire.
- Despite the 1998 Finding of No Significant Impact associated with the Tule Elk Management Plan written that year—which involved relocating nearly 50 animals by helicopter from Tomales Point to the wilderness area near the Limantour Road—in 2008, 2010, and 2013, when ranchers complained about tule elk causing problems on leased ranchlands, NPS claimed the elk could not be relocated without additional environmental review, despite there being functionally no difference between moving animals from Drakes Beach/Home Ranch rather than Tomales Point. (And it's worth noting that in the 2006 Non-Native Deer Removal Plan and EIS, elimination of the non-native deer's economic impacts on the leased ranches was described as a long-term, major beneficial impact.)
- Secretary of the Interior Ken Salazar prompted the NPS to issue 20-year permits to the ranchers in November 2012, yet a year later PRNS announced that a Ranch Comprehensive Management Plan, with associated NEPA review, would be required first, despite the fact that only the length of the permits would change.

Chart of Major Planning Efforts at Point Reyes National Seashore, 1990-present

<i>PRNS action</i>	<i>Land use change?</i>	<i>NEPA review?</i>	<i>Form of review</i>
Ranches transferring from Rights of Use and Occupancy (RUOs) to leases or permits, early 1990s	None	No	None
1998 Proposed expansion of Johnson's Oyster Co.	Yes, new buildings	Yes	EA and Finding of No Significant Impact (FONSI)
1998 Tule Elk Management Plan	Yes, relocation of elk to Limantour	Yes	EA and FONSI
2000 Evictions of Horick Ranch and Rancho Baulines	Yes, removal of ranching	No	None
2004 Fire Management Plan	Yes, increased fuels reduction	Yes	EIS
2006 Non-Native Deer Management Plan	Yes, removal of non-native deer by sharpshooters	Yes	EIS
2007 Giacomini Wetlands Restoration Plan	Yes, conversion of former ranch land to tidal wetlands	Yes	EIS
2008 Closure of rock quarries and fill from wetland dredging	Yes, and 2007 Restoration Plan specified a separate environmental review would be conducted	No	None
2009 Coastal Dunes Restoration	Yes, removal of non-native vegetation and dune restoration	Yes	EA and FONSI
Oyster farm transferring from RUO to permit (same process as ranches earlier), late 2000s	None	Yes	EIS, although never finalized, and permit was denied
2013 proposed re-issuance of existing ranching permits, with 20-year term	None	Yes	Ranch Comprehensive Management Plan and EIS (not completed)
2017 removal of oyster racks and piers from Drakes Estero	Yes	No	None

As the chart shows, since 2000, NEPA review has consistently been applied to agricultural lands in cases where no land use change would occur, merely a continuation of existing use, and has not been conducted for instances of removing agricultural or maricultural use. These are concrete examples of an agency applying NEPA inconsistently when it sees fit, apparently on the basis of whether it likes a particular program or project.

The most recent example to come to light, just a few weeks ago, is the fact that PRNS had completed a full Draft GMP/EIS in 2009, that it never released to the public. Park officials have been quoted as saying that the DBOC EIS meant that park staff did not have time to work on the Draft GMP, yet PRNS completed several large planning efforts—including the 1998 Elk Management Plan, the 2006 Non-Native Deer Management Plan, the 2007 Giacomini Wetlands Restoration Plan, a fire management plan, and a trails inventory—during the same time they were working on the Draft GMP. Furthermore, the Draft GMP was already completed, or very nearly so, when PRNS began work on the DBOC EIS.

And it was this lack of a completed GMP that was targeted in the most recent lawsuit: In 2016, the Arizona-based Center for Biological Diversity (CBD) and two

other groups filed suit and even brought a motion for a preliminary injunction to stop PRNS from renewing any permits for ranching at Point Reyes. CBD has long made clear its commitment to eliminating the working ranches from Point Reyes so it can be re-cast as a wilderness and preserve for the reintroduced tule elk. And, earlier this month, the Executive Director for the Idaho-based Western Watersheds Project, one of the other plaintiffs in the lawsuit, penned an op-ed in the San Francisco Chronicle calling for the elimination of ranching from Point Reyes, for the same reasons: <https://www.sfgate.com/opinion/article/Cattle-grazing-on-Point-Reyes-public-lands-is-12815606.php>. As I wrote on the last page of my 2017 book: “[W]hen absolutist environmental organizations sling lawsuits at the NPS that explicitly aim to end ranching at Point Reyes, they are bringing the legal equivalent of the rifles and threats of the Bundy militants to the local community.”

This suit resulted in a Settlement Agreement, whereby the NPS committed to study at least three alternatives for ranching, all of which result in the further reduction or elimination of ranching. Moreover, the Settlement Agreement gives PRNS until July 2021 to complete the process for this required General Management Plan Amendment (GMPA) and associated Environmental Impact Statement (EIS). While the Settlement Agreement was inked in July 2017, and initial scoping meetings were held and public comment solicited in November 2017, PRNS has yet to issue a Notice of Intent to formally begin preparation of the GMPA/EIS—which usually occurs before scoping begins, not after. As someone who has conducted Federal public land management planning and associated NEPA review myself, it’s difficult to understand what purpose delaying the Notice of Intent serves, and more importantly, why it would take 4 years to complete a GMP Amendment and EIS process, covering only a limited portion of the Seashore; in contrast, writing the full Resource Management Plan for the King Range NCA—an area of roughly the same size with very similar management issues to Point Reyes—took just a little over 2 years from start to finish.

These inconsistencies in NEPA and land management planning processes are troubling. Congress created the Point Reyes National Seashore, and so Congress ultimately bears responsibility for the decisions that are made there. If Congress cares about the future of this working landscape, it should provide clear direction regarding its intended purposes. When working to write the King Range NCA’s management plan, both the BLM staff and my team as consultants took guidance from the law establishing the Area, which gave clear, unambiguous direction. In the case of Point Reyes, the 1962 Enabling Act also contained clear congressional intent to retain the working ranches within the Seashore’s boundary. However, when NPS was granted full condemnation authority in the 1970 legislation, along with raising the land acquisition appropriation, the specific attention to agricultural lands was removed in the process. While Congress put in place a process for the ranching families to shift from RUOs to leases or permits with its 1978 legislation, it did not reaffirm its expressed intention that the working ranches remain indefinitely. Restating this intention now in the Seashore’s enabling legislation would not only help avoid further lawsuits, but would provide useful benchmarks for what is a reasonable range of alternatives to consider for NEPA review in the current GMPA/EIS process. Prompt passage of a narrowly tailored purposes amendment that preserves the historical and cultural uses of ranches and dairies at Point Reyes would finally provide the certainty and security of tenure necessary for these wonderful examples of sustainable agriculture to continue.

In closing, I want to strongly advocate for the importance of environmental review, as it is often the only moment where we stop and, at very least, *consider* the impacts of our actions on the human and non-human worlds around us—and yet I also want to advocate for the need for consistency in application of that review. It cannot scrutinize at one level here, and an entirely different one there. Its rigor—indeed, whether it is done at all—cannot merely turn on whether the lead agency “likes” a project.

Furthermore, in my book, I suggest that an environmental thinker who deserves more attention in park management is Aldo Leopold, who in his pioneering advocacy for wilderness protection also wrote of the importance of re-establishing a personal and cooperative relationship with the natural world through working the land. For Leopold, visiting and admiring is not enough; we need to recognize our reliance on and co-existence with the wild through living and working with it. I do not want to romanticize “the local,” but I also believe that communities who are directly affected by a Federal action, be it a project or a plan, should have some *specific* input into how that project or plan takes shape—not better than, or above, or before other public comment, but simply as a different category of input. NEPA aims to consider impacts on the *human* environment, but too often the near-scale of human involvement is sacrificed to the broader scales of national implications—whether in regard

to maximizing GDP or industrial profit on the one hand, or an idealization of environmental purity on the other.

Point Reyes has long been ideally suited to be managed as a Leopoldian park, a place where the wild and the pastoral are not in competition but are complementary, thriving side by side. The NPS itself is beginning to understand this relationship, with some of its leaders calling for a greater focus on integrated stewardship, as well as “deepening public engagement and establishing ever-more-meaningful connections” between parks and the communities they serve. Geographer David Lowenthal has advised the agency that parks and wilderness areas “must begin to exemplify, rather than be set apart from, the everyday terrain of our ordinary places of work and play, travel and repose.” Numerous examples of successful management of working landscapes within national parks can be found elsewhere around the globe. By building on the insight of Aldo Leopold, recognizing that the wild and the pastoral can not only co-exist but also strengthen each other, Point Reyes could be a powerful model of this evolving stewardship approach.

Supplemental Testimony Submitted for the Record by Dr. Watt

SONOMA STATE UNIVERSITY,
ROHNERT PARK, CALIFORNIA

May 5, 2018

Dear Representatives:

It has come to my attention that the National Parks and Conservation Association (NPCA) has submitted a letter to your Committee that, among other statements, takes issue with testimony I provided in writing on April 23, 2018, and in person at your Committee’s hearing on April 25, 2018. Specifically, the NPCA’s letter alleges that the Resilient Agriculture Group, of which I am a member, is “secretive” and that my testimony “lacks credibility on this topic and contains factual inaccuracies.” I am writing to rebut these claims.

To me, it is telling that the NPCA asserts that my testimony contains factual inaccuracies, yet the organization provides no evidence of such. The same is actually true of Representative Jared Huffman’s comments during the hearing, in that he stated that he “disagreed” with some of my testimony, but offered no facts or information to counter my detailed analysis. While he correctly stated that NEPA requirements vary widely with different kinds of projects and circumstances, my testimony contains instances of inconsistent review at Point Reyes applied to agency actions that are very, very similar, if not identical in their scope—such as extending an existing lease. I am confident that all information I have provided to the Committee is factually accurate and represents a genuine history of uneven application of NEPA.

The suggestion that I lack credibility on the topic of the application of environmental review under the authority of the National Environmental Policy Act (NEPA) is laughable; as I stated in my testimony, I not only teach NEPA and environmental planning regularly, I also have four years of experience as an environmental consultant, primarily contracted to produce twenty-year Resource Management Plans for several northern California BLM offices, one of which—our Plan and Environmental Impact Statement for the King Range National Conservation Area—won an award for “NEPA Excellence” from the National Association of Environmental Professionals. This background unquestionably gives me credibility on the subject of NEPA.

Furthermore, I have spent twenty years researching the history of land management at the Point Reyes National Seashore (PRNS) and the Golden Gate National Recreation Area (GGNRA)’s northern district. This work resulted in the 2017 publication by the University of California Press of my book *The Paradox of Preservation: Wilderness and Working Landscapes at Point Reyes National Seashore*, as well as several peer-reviewed articles. Given that my recent testimony focused on NPS practices of NEPA review at Point Reyes in the last few decades, I believe my archival research and analysis also gives me credibility to write and speak about Point Reyes and the uneven application of NEPA review for a variety of projects and plans.

Based on this research, I would also like to correct Representative Huffman's statement, made during the hearing, that "there are more acres grazed today than during the 1980 General Management Plan," as that is not the case. While the 1980 GMP did not include detailed tallies of all acres grazed, adding together the acreage in grazing for both the Point Reyes peninsula and the GGNRA lands managed by PRNS, the total was approximately 30,000 acres in 1980, and has decreased to 28,000 today. While this reduction is a relatively small portion of the total, the number of ranches that have ceased operation in this time is much larger: The Point Reyes peninsula supported twenty-five active ranches when the Seashore was established in 1962, but has only eleven active operations today, or fewer than half. In the GGNRA's northern district, the number of operating ranches has dwindled from twenty in 1972 to eight today, a decrease of roughly sixty percent. A working landscape cannot only be measured in terms of acres in grazing, but also in terms of the human families and broader community that those lands represent, so these reductions are truly troubling.

The NPCA's claim that the Resilient Agriculture Group is "secretive" is also inaccurate; members of our group have been quite open about our membership in the local press, and have been in regular correspondence with both the Point Reyes Seashore Ranchers Association (PRSRA), representatives of other organizations that support environmental quality and sustainable agriculture, and local elected officials on the subject of Point Reyes management for months. Anyone interested in the membership or the goals of our group only needs to ask. We are not currently incorporated formally, but neither are many other groups active in commenting on these issues—examples include the People for the Golden Gate National Recreation Area, which participated extensively in NPS management of both PRNS and GGNRA for decades; the Committee to Preserve the Tule Elk, which similarly provides comment letters on activities at Point Reyes; and indeed the PRSRA itself.

Lastly, the NPCA's letter also asserts that "Dr. Watt is not a rancher at the Seashore and does not speak for or represent the ranchers"; this statement is puzzling to me, as I have never claimed—neither in my testimony nor on any other occasion—to be a rancher or to represent the Seashore ranchers. In my Congressional testimony, I only represented myself as an expert on the subject at hand. I similarly have written comment letters to the Point Reyes National Seashore in the past, regarding their various planning and NEPA efforts, representing only myself and my professional expertise. I count many members of the PRSRA as personal friends, and in 2013 their organization honored me with a Certificate of Appreciation, which still hangs in my office. I am copying the PRSRA on this letter, to ensure that they understand that I would never presume to speak on their behalf; they are perfectly capable of representing themselves.

My testimony made clear my strong support for NEPA and the environmental review process; in no way have I questioned the need for environmental review, nor current planning efforts at Point Reyes. My comments called for better consistency in NEPA review going forward, based on evidence from the past, and I do not appreciate a national environmental advocacy group trying to imply otherwise.

Sincerely,

DR. LAURA ALICE WATT,
Professor.

The CHAIRMAN. Thank you. You did that with 6 seconds to spare, thank you.

I am going to apologize that I have to leave. I think, Mr. Thompson, you are going to take my place. Now I recognize Ms. Hamsher for your 5-minute testimony.

Thank you again, and I apologize for walking out on you. Nothing personal. You are recognized.

**STATEMENT OF MELISSA HAMSHER, VICE PRESIDENT,
ENVIRONMENTAL, HEALTH, SAFETY, AND REGULATORY,
ECLIPSE RESOURCES CORPORATION, STATE COLLEGE,
PENNSYLVANIA**

Ms. HAMSHER. Chairman Bishop, Ranking Member Grijalva, and members of the Committee, thank you for inviting me today to speak about my company's experience with permitting natural gas projects in Appalachia and dealing with NEPA.

My name is Melissa Hamsher, and I serve as the Vice President of Environmental, Health, Safety, and Regulatory at Eclipse Resources Corporation. I hope that my technical experience, coupled with my history working for a state regulator, and my current work in private industry will be beneficial to the Committee.

My company, Eclipse Resources Corporation, is an independent oil and gas exploration and production company focusing on cutting-edge technology and innovation as we develop oil and natural gas resources in the Appalachian Basin. We also pioneered the "Super-Lateral" drilling program.

As this Committee has heard before, the growth in oil and natural gas production in the Appalachian region has largely occurred on private and state lands, with development on Federal Government lands lagging far behind. These delays, largely the result of long Federal environmental reviews and litigation at most steps of the process are costing the United States Treasury significant dollars in royalty payments.

Let's start by focusing on the process of accessing Federal-owned sub-surface resources in Ohio. Eclipse has leased substantial sub-surface acreage within the boundaries of the Wayne National Forest for oil and natural gas development. After permitting and approval by the state of Ohio, the Federal Government inserted itself on environmental grounds, citing NEPA, even though BLM's only interest is in the proportionately small sub-surface minerals.

Piecemeal parcels of public and private land combined with a mixture of Federal and private mineral rights make up the Wayne National Forest.

You can change that.

[Slide.]

Ms. HAMSHER. This combination results in much of the land within the Federal boundaries being owned wholly by private parties.

Eclipse Resources initially submitted expressions of interest on parcels in the Wayne National Forest in 2012. In October 2016, BLM issued a finding of no significant impact, FONSI, and shortly thereafter announced their competitive online auction sale for leases on December 13, 2016. Eclipse Resources successfully won parcels in the December auction, but did not receive title until May 23, 2017, after 5 months of delay.

Proceeding with our development plans in July, we filed an APD for the well named Rolland A, Well Number 1H, with the intent of starting work in August. This well would be drilled horizontally, more than a mile beneath the surface from a 2016 well pad previously constructed on private land, in accordance with all state regulations.

Since we are utilizing horizontal drilling methods, the wells would have no significant impact to the Wayne National Forest. Therefore, we believe our submitted permits should be subject to BLM's categorical exclusion for no Federal surface impact. However, BLM determined that the agency must use the guidance in an outdated instructional memorandum which subjects APDs on private lands to environmental analysis that have nexus to Federal minerals. This decision came shortly after a lawsuit by environmental NGOs. We believe these two events are directly related.

Following this decision, 1 month later, in August, BLM conducted site visits on our landowners' private properties in an effort to undertake their NEPA analysis. States have primacy over development of minerals on private property. In accordance with Ohio regulations, Eclipse Resources had already conducted the necessary administrative and environmental reviews, meeting Ohio's requirements, and received all the relevant permits. Still, BLM deemed it necessary to conduct a full environmental assessment on private land, a requirement that Eclipse and its landowners have fully met.

Eclipse Resources will have no surface impacts to Federal surface parcels from oil or natural gas development occurring within the boundaries of the Wayne National Forest. The horizontal position of the well bore penetrates only sub-surface minerals. Private landowners hold title to all the surface parcels where the work will occur.

Despite our full cooperation with the process, I sit here today with no sense of when the Federal reviews will be completed, or when we can begin producing on private land, where Eclipse already has its state-issued permits in hand. I hope the Committee will look at issues like these to find ways to allow robust environmental reviews on state lands, coupled with responsible mineral development to control projects like Eclipse and others going forward.

In short, we would like the states to have primacy over environmental reviews for sub-surface Federal parcels with no Federal surface impact. Extensive and intrusive environmental and archeological studies are being conducted on private-surface lands where no Federal surface or Federal sub-surface are located within thousands of feet. This simply does not need to happen to ensure good stewardship.

[The prepared statement of Ms. Hamsher follows:]

PREPARED STATEMENT OF MELISSA L. HAMSHER, VICE PRESIDENT, ENVIRONMENTAL, HEALTH, SAFETY, AND REGULATORY, ECLIPSE RESOURCES CORPORATION

Chairman Bishop, Ranking Member Grijalva, and members of the Committee, thank you for inviting me today to speak about my company's experience with permitting natural gas projects in Appalachia and dealing with the National Environmental Policy Act (NEPA).

My name is Melissa Hamsher and I serve as the Vice President of Environmental, Health, Safety, and Regulatory at Eclipse Resources Corporation. I have held this job since 2011 and held a similar title at Rex Energy Corporation for 5 years prior to that. Before my work in the private sector, I worked at the Pennsylvania Department of Environmental Protection for 6 years as an engineer in the Bureau of Oil and Gas Management.

I may very well be the only environmental specialist with advanced technical knowledge of oilfield processes to come before this Committee, and I really do appreciate the opportunity to share the Eclipse story with you. I hope that my technical

experience, coupled with my history working for a state regulator and my current work in private industry, will be beneficial to the Committee.

My company, Eclipse Resources Corporation, is an independent oil and gas exploration and production company focused on cutting edge technology and innovation as we develop oil and natural gas resources in the Appalachian region. This testimony includes significant detail on Eclipse later.

As this Committee has heard before, the growth in oil and gas production in the Appalachian region has largely occurred on private and state lands, with development on Federal Government lands lagging far behind. These delays, largely the result of long Federal environmental reviews and litigation at most steps of the process, are costing the United States Treasury significant dollars in royalty payments. They also cost local governments funds they rely on for schools and other crucial programs. I understand that the Committee is currently working on both the ONSHORE Act and the POWER Counties Act. Both bills make valuable progress in fixing the issues related to oil and natural gas development involving Federal minerals. However, these two bills alone are insufficient to remedy extensive permit delays on projects that are carefully designed and environmentally responsible.

Let's start by focusing on the process of accessing Federal-owned, sub-surface resources in Ohio. Eclipse has leased substantial sub-surface acreage within the boundaries of the Wayne National Forest for oil and natural gas development. This hearing to better understand how bureaucratic delays caused by duplicative environmental reviews and extensive analysis by the Bureau of Land Management (BLM) for sub-surface mineral penetration effectively halts development of our Nation's natural resources is important and timely. Using our project within the bounds of the Wayne National Forest as an example, after permitting and approval by the state of Ohio, the Federal Government inserted itself on environmental grounds, citing NEPA, even though BLM's only interest is in the proportionately small sub-surface minerals.

Piecemeal parcels of public and private land, combined with a mixture of Federal and private mineral rights, make up the Wayne National Forest. This combination results in much of the land within the Federal boundaries being owned wholly by private parties. More background on the unique makeup of the forest follows, but these realities make Federal environmental review even less logical.

Since submitting our Application for Permits to Drill (APD) in July, Eclipse has faced numerous procedural roadblocks from BLM and unreasonable agency requests that have significantly delayed development and negatively affected our planned drilling programs. Multiple layers of Federal regulation, the direct result of BLM inserting itself into this process, have delayed this project for many months and we do not have a timeline for the process' conclusion.

Eclipse Resources initially submitted Expressions of Interest (EOIs) on parcels in the Wayne National Forest in 2012. In October 2016, BLM issued a Finding of No Significant Impact (FONSI) and shortly thereafter announced their first competitive online auction sale for leases on December 13, 2016. Eclipse Resources successfully won parcels in the December auction sale but did not receive title until May 23, 2017, after more than 5 months of delay.

Proceeding with our development plans, in July, we filed an APD for the well named *Rolland A, Well Number 1H*, with the intent to start work in August. This well would be drilled horizontally, more than a mile beneath the surface from the 2016 well pad previously constructed on private land—in accordance with all state regulations.

Since we are utilizing horizontal drilling methods, the wells would have no surface impact to the Wayne National Forest. Therefore, we believe our submitted permits should be subject to BLM Categorical Exclusion (CX) Document 43 CFR part 1600 2016 Amendment, as there would be no surface occupancy or disturbance of the unit.

However, BLM determined that the agency must use the guidance in an outdated Instruction Memorandum 2009-078, which subjects APDs on private lands to environmental analyses that have nexus to Federal minerals. This decision, coincidentally, came shortly after a lawsuit by environmental non-governmental organizations.

Following the decision, 1 month later in August, BLM conducted site visits on our landowners' private properties in an effort to undertake their NEPA analysis. States have primacy over development of minerals on private property. In accordance with Ohio regulations, Eclipse Resources had already conducted the necessary administrative and environmental reviews, meeting Ohio's requirements, and received all relevant permits. Still, BLM deemed it necessary to conduct a full environmental assessment on private land—a requirement that Eclipse, and its landowners, have fully met.

Eclipse Resources will have no surface impacts to Federal surface parcels from oil and natural gas development occurring within the boundaries of the Wayne National Forest on Federal surface parcels. The horizontal portion of the well bore penetrates only sub-surface minerals. Private landowners hold titles to all of the surface parcels where the work will occur.

To summarize, Eclipse has followed all applicable state guidance, laws, and regulations, cooperated with the Federal Government, and implemented aggressive environmental mitigation techniques for exploration on private land within the boundaries of a national forest. Despite the foregoing, BLM has repeatedly slowed the review of this project and has undertaken an unwarranted full environmental review. Despite our full cooperation with the process, I sit here today with no sense of when the Federal reviews will be completed or when we can begin producing on private land where Eclipse already has its state-issued permits in hand.

At the same time, no other producer has received an APD from that December 2016 sale. Almost 18 months after leases were purchased, the Federal Government has obstructed development.

While I have spent a lot of time discussing our natural gas exploration experience, I want to note that NEPA applies to a broad range of projects—airports, highways, resource exploration, renewable projects, and so many other types of development. I bring this up, because while discussing NEPA is important to Eclipse and its projects, it is crucial to so much economic growth all over our country.

I hope the Committee will look at issues like these to find ways to allow robust environmental reviews in the states, coupled with responsible mineral development, to control projects like Eclipse's and others going forward. In short, we would like the states to have primacy over environmental reviews for sub-surface Federal parcels with no Federal surface impact. Extensive and intrusive environmental and archeological studies are being conducted on private surface lands where no Federal surface or Federal sub-surface are located for thousands of feet. This simply does not need to happen to ensure good stewardship.

In addition, I would like to provide some significant background for the Committee's consideration on Eclipse Resources, the company's advanced environmental controls and protections, oil and gas exploration in Appalachia, and the particulars of the Wayne National Forest.

ECLIPSE RESOURCES

Eclipse pioneered the "Super-Lateral" drilling concept, leading the industry with the development of horizontal wells in excess of 3 miles in length. Our innovations have led to less expensive well development, more efficient resource development, and, most importantly, safety and environmental excellence.

As you know, Appalachia is at the center of the Utica and Marcellus Shale plays, and Eclipse has focused on the responsible development of resources in the "core" of the natural gas fields in southeastern Ohio. While our corporate headquarters are located in Pennsylvania, we have our primary production volumes in the state of Ohio.

ENVIRONMENTAL CONTROLS

I want to underscore Eclipse's commitment to environmental stewardship. While Eclipse outlines many of the environmental safeguards we undertake in the work we do in Appalachia on its corporate website, I would like to draw your attention to some efforts that I think are particularly important. During development, we conduct reviews and studies that far exceed state or Federal requirements.

Eclipse uses a closed-loop drilling system, which recycles drilling fluids and eliminates the need for earthen pits. This practice, although not required by law, ensures that there are no environmental impacts to local groundwater sources, or to flora and fauna from cuttings and fluids storage. Eclipse ensures minimization of its environmental footprint through the installation of multi-well pads, which diminish the effects on local infrastructure and limit forest fragmentation. "Green Fracs," while not required, are employed by Eclipse to reduce diesel emissions through the utilization of natural gas as a power source during hydraulic fracturing operations. Where state regulations may be lagging, we take it upon ourselves to ensure the sustainability of surface water aquatic biology through extensive stream studies and self-imposed water withdrawal restrictions.

Prior to it being required by regulation, Eclipse was a pioneer in voluntarily submitting chemical usage to the public. Eclipse employs a robust air protection program, studying, monitoring, and testing to ensure fugitive emissions do not exist at our well sites. While the company's environmental stewardship is not necessarily

the topic of this hearing, it is crucial to Eclipse's business and something I want to ensure is on the record, as I discuss the effect of NEPA on our operations.

OIL AND GAS IN APPALACHIA

Given Eclipse Resource's position in southeastern Ohio, at the center of Appalachian shale development, I also wanted to share some key facts and figures from the region with you. The oil and natural gas industry supports more than 650,000 jobs, paying more than \$41 billion in wages, and had a \$90 billion economic impact in Pennsylvania, Ohio and West Virginia in 2015, according to a PricewaterhouseCoopers LLP study released last year by the American Petroleum Institute. In addition, hundreds of millions of dollars have been spent on taxes that support local schools, municipal governments, and vital infrastructure.

What's more is that these investments have occurred in some of the most economically depressed areas of these three states, along the Ohio River. In Ohio, for example, the oil and natural gas industry paid more than \$45 million in taxes and \$300 million in improvements to roads and bridges.

Counties along the Ohio River have reported that they would have gone bankrupt, had it not been for the oil and natural gas industry activities over these past few years. There is simply no greater example of the economic turnaround in Appalachia than Monroe County, Ohio. In 2013, Monroe County lost its largest employer, the Ormet aluminum smelting plant, leaving 1,000 people out of work in Ohio and West Virginia. The county of 14,500 people faced a bleak future with skyrocketing unemployment and a loss of \$4.5 million in tax revenues from the plant closure.

However, thanks to some of the best natural gas producing wells in the Appalachian Basin, sales tax revenues have skyrocketed, jumping over 340 percent. Unemployment in the region has declined to 10.4 percent after spiking above 14 percent in 2014 according to data from the Ohio Department of Job and Family Services. This prolific natural gas production has led to other major investments in the region, such as a natural gas power plant and a natural gas liquids storage hub.

What concerns us, however, is that the county is only just beginning the road to recovery and these economic gains are at risk as Federal red tape is causing unnecessary roadblocks to continued investments in these communities.

THE WAYNE NATIONAL FOREST

To highlight this point, Monroe County is home to the Wayne National Forest and some of the most prolific natural gas wells in the Utica Shale. There are several dozen oil and natural gas producers that operate in Monroe County, both large operators and small operators. In fact, there are over 1,200 decades-old wells producing oil and natural gas on the surface of the Wayne National Forest today, independent of the newer shale wells. Unlike many other Federal forests, the Wayne National Forest is a patchwork of private and Federal lands and minerals. In fact, the Federal Government only holds ownership of 25 percent of the land within the Forest Proclamation Boundary. In addition, 59 percent of the minerals in the boundaries of the Wayne National Forest are privately owned.

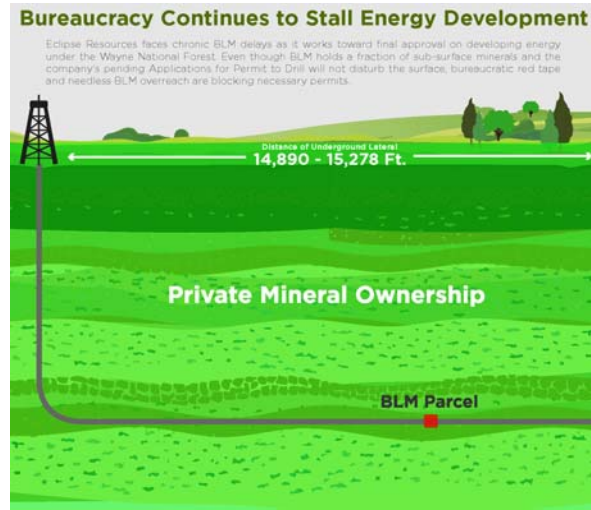
Federal lands are exempt from property taxes, which can create financial hardships for entities that receive public funds and in Ohio. With property taxes as the primary base of school district and township funds, local governments in Ohio are awaiting new development in the region. Leasing of Federal minerals and, more importantly, royalty monies received from oil and natural gas production is sorely needed to help fund local schools and municipalities in these Appalachian communities. Just last week, the superintendent of the Switzerland Local School testified before the Energy and Mineral Resources Subcommittee in support of the POWER Counties Act about this growing issue, and I would encourage you to review his testimony, if you have not already done so.

To date, the oil and natural gas industry has spent over \$8 million to secure Federal leases in the Wayne National Forest. A portion of those bonus payments has already gone back to local communities. It is my understanding that the intent of allowing leases on Federal land is to realize development of minerals and collect royalty payments, lease payments, and tax revenue. With the Federal Government's fiduciary responsibility to the taxpayers to see our minerals developed, I very much hope we can work together to eliminate the unnecessary delays and snags in the permitting process.

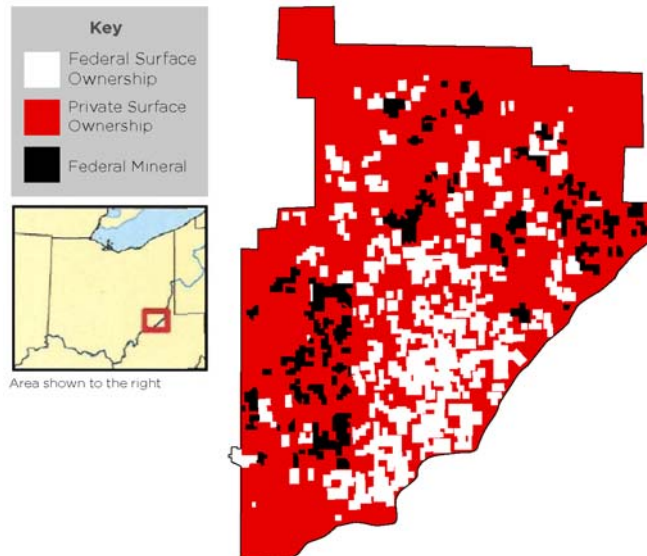
I want to re-emphasize that since the Bureau of Land Management's first lease sale, which was held December 13, 2016, not one Application for Permit to Drill (APD) has been issued.

CONCLUSION

Again, I want to say thank you to the Committee for holding this important meeting today. I look forward to working with all of you to find a way to ensure responsible mineral development on both public and private land, under the direction of states and as intended by Congress. I look forward to answering your questions and continuing the conversation.



Wayne National Forest Marietta Unit



Source: Wayne National Forest Leasing EA Map 3: Marietta Unit EOs To Date
 This map is intended for display purposes only. No warranty is made on the accuracy, reliability, or completeness of information displayed. Spatial information may not meet National Map Accuracy Standards. Information in this map may be updated without notification.

Mr. THOMPSON [presiding]. Thank you, Ms. Hamsher.
I am now pleased to recognize Mr. Greczmiel for 5 minutes.

**STATEMENT OF HORST GRECZMIEL, FORMER ASSOCIATE
DIRECTOR FOR NEPA OVERSIGHT AT COUNCIL ON ENVI-
RONMENTAL QUALITY, FAIRFAX, VIRGINIA**

Mr. GRECZMIEL. Thank you. Chairman Bishop, Ranking Member Grijalva, and members of the Committee, thank you for inviting me here today to speak to you about the National Environmental Policy Act, its implementation, and NEPA litigation.

For over a decade, I worked at agencies writing, reviewing, and providing guidance on NEPA reviews. I then moved over to the Council on Environmental Quality, where I served as Associate Director for NEPA for over 16 years. My work focused on NEPA and other environmental reviews and permits for all manner of Federal agencies' approvals and activities, including putting new or revised regulations into place, establishing land management policies and plans, and the development of pipelines, transmission lines, bridges, highways, and other infrastructure.

NEPA is often referred to as this country's environmental Magna Carta, as it says, "to create and maintain conditions under which man and nature can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations."

NEPA does not put the environment above other requirements, or above the social, economic, or other issues. It simply requires Federal agencies to inform decision makers and the public of the environmental consequences of a proposed action before a decision is made.

One of the most rewarding aspects of being Associate Director for NEPA was the opportunity to work with Federal, tribal, state, and local officials and local citizens who sought a greater voice, either as formal partners in the NEPA process or in providing comments on NEPA reviews that impacted their lives.

The NEPA process, the analytical framework for NEPA reviews, is fleshed out in the CEQ regulations and the agency NEPA implementing procedures. As you heard, there are three levels of environmental review.

The categorical exclusion, which agencies establish because they believe that that type of activity is not one that has significant environmental impacts or the potential for those impacts, is used over 95 percent of the time. Tens, if not hundreds, of thousands of actions a year that are taken by the Federal Government are covered by categorical exclusions.

The next level of environmental review is a bit more rigorous, and that is the environmental assessment when a CE isn't appropriate and the agency hasn't determined that there could be potential significant impacts. Approximately 4 percent of NEPA reviews, tens of thousands a year, are environmental assessments.

Finally, the most intensive level of review is the environmental impact statement. An EIS is used when the proposed action is considered to have the possibility for those significant impacts. Approximately 1 percent of NEPA reviews, about 200 a year, go through the EIS process.

Does the process or litigation slow down Federal permits or approvals? As to timeliness, let me be clear. Considering the consequences before taking action, considering alternatives that might have less of an impact, looking at the impacts of the proposed activities, and engaging the public does take time. But that is time that, in my opinion, should be taken when there is a potential for significant environmental impacts that an affected community may have to live with for years or decades.

Experience has taught me that NEPA is not usually the cause of delays, and delays do occur in a large number of NEPA reviews. A multitude of factors, including a lack of funding for the projects, change in project design after planning has started, change in priorities, local opposition, or delays in other non-NEPA permitting or approval processes at the state, local, or tribal level have all added to those.

I might add that, sadly, not providing the capacity, the people, and the training to prepare and oversee NEPA reviews and how to use the efficiencies, the lessons learned, and the latest developments in improving the timeliness of NEPA also leads to delay.

The CEQ regulations provide many mechanisms. You have already heard of the three levels that make the amount of review commensurate with the expected impacts. But they also provide for tailored time limits, using an open process for identifying the issues that merit review, and integrating NEPA's requirements with others to avoid duplication. Just as the number of required EISs is proportionately low in comparison to the number of reviews, in my experience the number of cases filed is proportionately very small, with concerned parties currently typically filing approximately 100 NEPA lawsuits per year. Considering the amount of Federal actions that are taken, that context, I think, is important.

The criticism that NEPA produces wasteful litigation overlooks the essential role that it plays. For many, it is the only mechanism for enforcing NEPA. The main reason plaintiffs file suit was, and continues to be, that NEPA is inadequate because the information was incomplete, or the analysis was not sufficient. Litigation is often their only recourse.

Most litigation is won by the agencies, by the way. However, despite courts' deference to agency work, a good number of cases find that the plaintiff's challenges do have merit. In 2016, 30 percent of the appellate cases found for the plaintiffs.

Injunctions and remands, they don't stop NEPA, they require the agency to go back, correct their work, and allow the project to proceed.

Finally, from my perspective working with local communities, bringing suit and litigation is expensive and time-consuming. It is usually the last resort that they want to employ after they have been shut out of the NEPA process, or have been unable to work effectively in that process, so that their concerns could be met.

Thank you, and I look forward to answering your questions.

[The prepared statement of Mr. Greczmiel follows:]

PREPARED STATEMENT OF HORST GRECZMIEL, FORMER ASSOCIATE DIRECTOR FOR
NEPA OVERSIGHT AT COUNCIL ON ENVIRONMENTAL QUALITY

INTRODUCTORY REMARKS

Chairman Bishop, Ranking Member Grijalva, and members of the Committee, thank you for inviting me to speak to the House Natural Resources Committee on the National Environmental Policy Act (NEPA), its implementation, and NEPA litigation.

I first became familiar with NEPA near the end of my 14-plus year military career when, after receiving my LL.M. in Environmental Law from George Washington University, I was assigned to the U.S. Army Environmental Law Division. There, I worked on NEPA and other environmental reviews and permits on activities including desert training operations, military installation development and expansion, and base closure and realignment. After leaving active military service in 1992, I entered the civilian Federal workforce as an attorney advisor at the Coast Guard Environmental Law Division. At the Coast Guard, my work focused on NEPA and other environmental reviews and permits for activities including the disposition of Governor's Island and Coast Guard vessel operations along the Atlantic coast. While at USCG Headquarters, I served a detail to the Council on Environmental Quality (CEQ) during the President George H.W. Bush administration. Several years later, in November 1999, I became the Associate Director for National Environmental Policy Act Oversight at CEQ, overseeing the Federal Government's implementation of NEPA. I served in that capacity for over 16 years and retired on December 31, 2015.

THE NATIONAL ENVIRONMENTAL POLICY ACT

The National Environmental Policy Act, NEPA, is often referred to as this country's environmental Magna Carta and is viewed as an essential tool to help agencies plan Federal actions responsibly. The Act requires Federal agency leaders, the decision makers, to consider the environmental consequences of their actions before making a decision. NEPA sets forth this Nation's policies regarding the environment in Section 101, the Congressional Declaration of National Environmental Policy, where Congress declares:

it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

The Act goes on to provide important policy goals:

it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

- 1. fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;*
- 2. assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings;*
- 3. attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;*
- 4. preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity, and variety of individual choice;*
- 5. achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and*
- 6. enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.¹*

¹ 42 U.S.C. § 4331.

Congress passed NEPA by overwhelming bipartisan majorities.² Signed into law by President Richard M. Nixon, the Act mandated that Federal agencies employ the NEPA process to achieve those policy goals. It also established CEQ to, among other responsibilities, oversee the implementation of NEPA. In 1983, the U.S. Supreme Court made it clear that NEPA has two main goals:

First, it places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action. Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decision-making process. Congress in enacting NEPA, however, did not require agencies to elevate environmental concerns over other appropriate considerations. Rather, it required only that the agency take a "hard look" at the environmental consequences before taking a major action . . . Congress did not enact NEPA, of course, so that an agency would contemplate the environmental impact of an action as an abstract exercise. Rather, Congress intended that the "hard look" be incorporated as part of the agency's process of deciding whether to pursue a particular Federal action.³

THE NEPA PROCESS

The NEPA process provides an analytical framework fleshed out in the CEQ Regulations Implementing the Procedural Provisions of NEPA Regulations issued in 1978 (CEQ NEPA Regulations).⁴ NEPA affords the public the opportunity the public and local governmental officials notice and the opportunity to be informed during Federal Government decision making; giving them a voice in those decisions and allows them to suggest alternatives and further refined and adapted to agency missions and needs in Federal agency NEPA Implementing Procedures.⁵ During the course of the NEPA process, a Federal agency identifies a need for a taking action, develops a proposed action, identifies reasonable alternatives, and analyzes the potential effects of the alternatives.

There are essentially three levels of NEPA review:

- Categorical Exclusion (CE): A CE is a category of actions established, after CEQ and public review, in agency procedures implementing NEPA that is expected not to have individually or cumulatively significant environmental impacts. An action within such a category is excluded from analysis and documentation in an Environmental Assessment or an Environmental Impact Statement provided there are no unusual circumstances associated with the proposed action that warrant further environmental consideration, or, in NEPA terms, that there no extraordinary circumstances. A CE can be concluded with a determination that a proposed action falls within one of the established categories of actions and there are no extraordinary circumstances.⁶
- Environmental Assessment (EA): When a CE is not appropriate, or if the agency has not determined whether a proposed action could cause significant environmental effects, then an EA is prepared. If, as a result of the EA, a finding of no significant impact (FONSI) is appropriate, then the NEPA review process is completed with the FONSI or, when mitigation is included to reduce the intensity of the impacts to a level that is not significant, a mitigated FONSI; otherwise an EIS is prepared.⁷
- Environmental Impact Statement (EIS): When a proposed action is expected to result in significant impacts to the human environment, the agency prepares an EIS, the most intensive level of analysis. The NEPA review process is concluded when a record of decision (ROD) is issued.⁸

²The House of Representatives adopted NEPA by a vote of 372 to 15. 115 CONG. REC. 19,013 (1969). The Senate passed NEPA by voice vote without recorded dissent. 115 CONG. REC. 26,590 (1969).

³*Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97, 100 (1983).

⁴40 CFR parts 1500-1508 available at <https://www.ecfr.gov/cgi-bin/text-idx?SID=30655823cf5f0dcb1c5ee59d01883b89&mc=true&tpl=/ecfrbrowse/Title40/40chapterV.tpl>.

⁵40 CFR 1507.3. Agency implementing procedures are available at <https://www.ecfr.gov/cgi-bin/text-idx?SID=30655823cf5f0dcb1c5ee59d01883b89&mc=true&tpl=/ecfrbrowse/Title40/40chapterV.tpl>.

⁶40 C.F.R. § 1508.4.

⁷40 C.F.R. § 1508.9.

⁸40 C.F.R. part 1502.

The conclusion of the NEPA process provides decision makers and the public with a “hard look” at the environmental consequences of proposed actions. Recognizing there are many factors in addition to the environment that are considered when making a decision, it is left to agency leaders to decide whether and how to best proceed.

One of the groundbreaking and most valued aspects of the NEPA process is that NEPA gives a voice to the people. NEPA affords the public and local officials notice of what their government is doing before it happens. NEPA affords them the opportunity to offer reasonable alternatives and to be involved in the analyses that informs Federal decisions that impact their communities and livelihoods. One of the most rewarding aspects of being Associate Director for NEPA was the opportunity to work with Federal, tribal, state, and local officials, including mayors, county commissioners, governors, tribal councils, and with local citizens who sought a greater voice in how the Federal environmental reviews and permits impacted their activities and lives, either as formal partners in the NEPA process or in providing comments on a NEPA review. Many of them told me how important it was that they could participate in this way.

There is a considerable amount of flexibility under the CEQ NEPA Regulations as to how agencies can implement the NEPA process. Under the CEQ NEPA Regulations each department and agency identifies, based on experience and expertise, the anticipated level of environmental review that is typically necessary for undertaking the type of actions it normally undertakes. Those anticipated levels are identified in the agency NEPA procedures that are called for by the CEQ NEPA Regulations and are reviewed and approved by CEQ.⁹ In addition, CEQ issues guidance and provides direction on implementing NEPA and the CEQ NEPA Regulations. CEQ also works with agencies to address the challenges they face when implementing those procedures for all manner of Federal decisions (e.g., placement and development of pipelines, transmission lines, bridges, water treatment facilities, military relocations, nuclear material storage, and land management policies and plans).

There is ongoing debate regarding the need for measures to address assertions that NEPA delays Federal projects. A good portion of that debate stems from disagreement among stakeholders regarding the degree to which, if any, the NEPA process itself is to blame for Federal project delays. Complaints about delays attributed to the NEPA process generally fall into two broad categories: those related to the time needed to complete required NEPA reviews (primarily EISs) and those resulting from NEPA-related litigation.

TIMELINESS

I'll first address the issue of delay that people attribute to the time needed for NEPA reviews and will note the efficiencies available to address key challenges Federal agencies face in ensuring the timeliness of NEPA reviews. The perception that compliance with NEPA causes significant delays in approvals of large numbers of proposed actions is simply wrong. Experience taught me that NEPA is not usually the cause, and that delays do not occur in a large number of NEPA reviews.

A multitude of factors, other than NEPA, can affect the timing of Federal project delivery. In my experience factors that can cause delay include lack of funding, changes in the design or planning processes, inadequate staff capacity to implement or even oversee the NEPA process, changes in priorities that keep a proposed project from proceeding in the near term, local controversy or local opposition to a project, or delays in other (non-NEPA) permitting or approval processes at the Federal, state, tribal, or local level. With regard to the latter, certain Federal actions such as highway construction projects and permitting for mining operations, cattle grazing, forest thinning, and energy development may require compliance with other statutory and regulatory requirements which can add time, especially if they are raised late in the environmental review process. This is particularly the case when such review or permitting requires the participation or input of increasing numbers of local, state, tribal, or Federal agencies. In addition, agencies responsible for protecting resources are often confronted by problems with the project's alternatives analysis, incorrect or incomplete information, disagreements or differences of opinion among agencies, poor communication with project proponents and other agencies, or the environmental or biological analyses associated with the

⁹ 40 CFR 1507.3(a).

project.¹⁰ More often than not, factors other than complying with NEPA or the NEPA Regulations are the reasons for delaying Federal projects.

NEPA does take time, and that should be time well spent. For example, NEPA should take time when a proposed action has the potential for significant environmental impacts that an affected community likely may live with for decades if not centuries, depending on the nature of the action. Time taken for the purposes of preparing a sound analysis and adequate public involvement is time well spent. It is also important to understand that citizens need some real time to review documents and write comments.

It is also true the NEPA process is delayed at times for reasons that have nothing to do with the protection of the environment, our communities, or public lands. In my experience, and the experience of many that I have worked with, there are two key reasons for such delays, both are issues of capacity: lack of agency staff with responsibility for NEPA implementation and lack of adequate training. Agency capacity has been severely diminished over the last 20 years. In some agencies, offices have been disbanded; in others, additional responsibilities have been assigned to staff to the point that their capacity for NEPA work is severely diluted. In one of the worst situations I encountered, an agency decided not to fill regional NEPA positions on the theory that “everyone” would do the NEPA work. Just as detrimental is the loss of capacity for NEPA training within the agencies, either through lack of funding for training or through the loss of expertise to provide internal training. For far too many employees, NEPA is an “other duty as assigned.”

Additionally, far too many employees with NEPA responsibility are provided only “OJT”, on the job training. Regrettably, that training too often relies on how the work has been done in the past rather than focusing on lessons learned and integrating improvements into the agency NEPA process. Staff members who are not fully trained in implementing NEPA often end up doing extra work in an attempt to make sure they are doing the right thing and agency lawyers require more time to ensure there is an adequate record to support the agency decision. An effective NEPA process would ensure sufficient people with knowledge and capacity are in appropriate agency offices.

Compounding the lack of capacity problem is the paucity of information about the implementation of NEPA noted by the Government Accountability Office (GAO) and the Congressional Research Service (CRS) in their 2014 and 2015 reports.¹¹ However, GAO and CRS have prepared a series of reports, remarkably consistent in their findings, regarding the construction of highway projects and the relationship of environmental laws generally and NEPA specifically to decision-making timeliness. More of this type of analysis is needed if agencies and/or legislators are going to be able to identify the causes of delays and formulate successful approaches to reducing such delays. In short, a number of Federal projects have indeed been delayed or stopped but for reasons that have nothing to do with NEPA; unfortunately and unfairly NEPA usually gets the blame.¹² Misplaced blame makes correcting any problem more difficult.

In the years prior to my retirement, the Federal agencies intensified their efforts to identify and address the challenges agencies face in preparing timely and effective NEPA reviews. Among the challenges identified were the need for early communication and coordination among all the agencies involved in the environmental review of a proposed action and developing and meeting coordinated timelines. Another key challenge is in identifying and engaging all agencies—Federal, tribal, state, and local—as well as the public, particularly the communities likely to be impacted, in order to focus on the issues that need to be addressed during the review and permitting process and the analyses and methods to address those issues.

EFFICIENCIES

Before I turn to recent initiatives, the CEQ NEPA Regulations merit attention. Although they are frequently criticized for their age, such criticism overlooks the value they add to NEPA reviews by focusing on efficiencies and timeliness.

¹⁰ See, for example, *The Role of the Environmental Review Process in Federally Funded Highway Projects: Background and Issues for Congress*, CRS 7-5700, R42479, April 11, 2012, p. 36.

¹¹ *Little Information Exists on NEPA Analysis*, GAO-14-369, April 2014, p. 7-8; *The National Environmental Policy Act (NEPA): Background and Implementation*, CRS RL33152, January 10, 2011, p. 26.

¹² See, *The National Environmental Policy Act: Streamlining NEPA*, CRS 7-5700, December 6, 2007 and *The Role of the Environmental Review Process in Federally Funded Highway Projects: Background and Issues for Congress*, CRS 7-5700, R42479, April 11, 2012.

As noted above, the CEQ NEPA Regulations require agencies to establish agency-specific NEPA implementing procedures that allow for the efficient identification of the appropriate level of NEPA review for a proposed action (categorical exclusion [CE], environmental assessment [EA], and environmental impact statement [EIS]). These three levels of NEPA review exemplify the flexibility provided by NEPA in shaping the extent of the environmental analysis to be commensurate with the expected environmental effects. This flexibility has proven itself over time as evidenced by the fact that most Federal actions receive only the least rigorous form of environmental review—the CE—and a relatively small number of Federal actions receive the most rigorous—the EIS. This is demonstrated by the fact that fewer than 300 final EISs have been published by the agencies each year since 2000.¹³ This is also borne out by the results of the congressionally mandated reporting on the status of NEPA reviews for the hundreds of thousands of Federal activities funded under the American Reinvestment and Recovery Act (ARRA).¹⁴

The ARRA reports from May 2009 through November 2011 covered over 275,000 funded activities for which agencies fulfilled their NEPA responsibilities with over 184,000 CEs, over 7,000 EAs, and less than 900 EISs.¹⁵ This Federal Government wide data is consistent with information provided by one agency that tracks all of its NEPA reviews. In 2007, the Federal Highway Administration reported that approximately 92 percent of all highway projects met their NEPA responsibilities with CEs, and approximately 4 percent were met with EAs and 4 percent with EISs.¹⁶

In addition to calling for agency-specific procedures that allow for the efficient identification of the appropriate level of NEPA review, the CEQ NEPA Regulations encourage agencies to reduce paperwork and delay (40 C.F.R. sections 1500.4 and 1500.5). They also provide for tailored time limits (40 C.F.R. section 1501.8); scoping by using an early and open process for identifying those issues that merit detailed analysis (40 C.F.R. section 1501.7); integrating NEPA requirements with other review and consultation requirements to avoid duplication of effort (40 C.F.R. section 1502.25); and eliminating duplication with state and local procedures (40 C.F.R. section 1506.2).

Throughout my time as Associate Director for NEPA at CEQ, I found that the over-arching and common objective to improve the efficiency and timeliness of the NEPA process aligned with the goals of many major Administration initiatives. Efforts to improve the timeliness and efficiency of NEPA reviews are now beginning to yield government wide improvements. For example, the Corps of Engineers led the interagency effort that developed an up-to-date “how-to” guide for synchronizing environmental reviews as early as possible.¹⁷ Another interagency effort focused on reducing delay through early engagement and coordination with all agencies that may be involved in the environmental review and permitting of a proposed action as well as the communities that may be impacted is the Unified Federal Review (UFR) initiative. The UFR initiative, led by the UFR Steering Committee,¹⁸ establishing an expedited and unified interagency review process to ensure compliance with environmental and historic requirements under Federal law relating to disaster recovery projects.¹⁹

Finally, the continued and increased use of a public, transparent, Permitting Dashboard²⁰ that tracks agencies’ progress in coordinating and meeting major review and permitting milestones incentivizes expeditious preparation and comple-

¹³In 2012, the last year for which data is posted on the CEQ website, there were less than 200 draft and less than 200 final EIS prepared and filed (available at <https://ceq.doe.gov/docs/get-involved/combined-filed-eiss-1970-2012.pdf>). The EPA EIS database shows an average of less than 400 draft and final EISs were filed in 2013–2017 (available at <https://cdxnodengn.epa.gov/cdx-enepa-public/action/eis/search>).

¹⁴Public Law 111–5, Section 1609(c): “The President shall report to the Senate Environment and Public Works Committee and the House Natural Resources Committee every 90 days following the date of enactment until September 30, 2011 on the status and progress of projects and activities funded by this Act with respect to compliance with National Environmental Policy Act requirements and documentation.”

¹⁵Available at <https://ceq.doe.gov/ceq-reports/recovery-act-reports.html>.

¹⁶*The National Environmental Policy Act (NEPA): Background and Implementation*, CRS RL33152, January 10, 2011, p. 15–16.

¹⁷*The Red Book on Synchronizing Environmental Reviews for Transportation and Other Infrastructure Projects* available at https://www.environment.fhwa.dot.gov/strmlng/Redbook_2015.asp.

¹⁸Federal Emergency Management Agency, the Department of Homeland Security, the Advisory Council on Historic Preservation, and CEQ.

¹⁹Unified Federal Environmental and Historic Preservation Review at <https://www.fema.gov/unified-federal-environmental-and-historic-preservation-review-presidentially-declared-disasters>.

²⁰www.permits.performance.gov.

tion of NEPA reviews as well as any other necessary reviews and permitting processes. The Permitting Dashboard also has the potential to identify other factors that impact the efficiency, transparency, and accountability of Federal decisions. By providing a fact-base set of data on multiple projects, a public dashboard can identify factors that contribute to delays and allow for more fully informed discussions of whether further changes should be considered and how those changes would interact with the other factors at play in reaching a final decision. The overly simplistic and, I would argue, misleading reliance on simply cost and time, and examples of long or short process times that support a presenter's subjective view of the value of the process are not helpful. The data on a transparent dashboard and other information can then be used to identify and develop additional practices to improve the process without undermining the value of the reviews, informed decision making, and public participation.

NEPA LITIGATION

Opponents of NEPA often incorrectly blame NEPA litigation for project delays. Just as the number of required EISs is proportionately low, so too are the number of lawsuits brought and the even lower number of cases that succeed against the Federal Government. The number of NEPA cases began to decline in the mid-1970s and has remained relatively constant since the late 1980s.²¹ Out of the tens of thousands of Federal actions that require environmental reviews under NEPA, only a small fraction is challenged in lawsuits. Although litigation may have had a larger impact in the past, the total number of NEPA-related cases in the past two decades has been proportionately very small when compared with the total number of Federal actions requiring some level of environmental review under NEPA. Furthermore, the main reason that plaintiffs filed suit was, and continues to be, their claims that an EIS or EA is inadequate (e.g., information was incomplete or the document did not sufficiently analyze the direct, indirect, and cumulative effects of an action).²² Plaintiffs are typically required to show that the agency was made aware of their concerns during the NEPA process itself rather than “ambushing” the agency for the first time in court.

Critics of NEPA often contend that the Act produces too much wasteful litigation. Such criticism overlooks the essential role the courts play by ensuring NEPA is enforced. When Federal agencies' NEPA compliance falls short, litigation brought by aggrieved parties is often the only recourse to ensure an adequate NEPA review and sufficient public engagement for a particular project or activity. Agency personnel and industry representatives sometimes complain about the pressure that the Act places on agencies to do thorough and defensible environmental reviews, lamenting the creation of “bulletproof” EISs. In my experience there are indeed excessive documents, but it is not required by courts. Rather it comes from agencies “throwing in the kitchen sink” instead of focusing their attention on the issues that matter.

Removing or limiting the opportunity for judicial review will not guarantee more focused or concise analyses. It is more likely that without the enforcement mechanism provided by the courts, Federal agency EISs would devolve into rote documents or checklists making NEPA a hollow and worthless exercise. Such an outcome further reduces the opportunity for public involvement in agency decisions that affect them and leads to less informed and effective agency decision making.

The courts' rulings in NEPA cases have clarified many of the basic principles for conducting environmental impact analyses under the Act. The application of those principles to the circumstances of a particular Federal project, however, is inevitably case-specific and fact driven. It is thus not surprising that the courts confront certain difficult recurring issues—such as the appropriate level of NEPA review, adequate analysis of cumulative impacts, or whether a Federal agency has properly determined its action will not have significant effects on the human environment—whenever they are confronted with a new proposed project or activity.

The criticism that NEPA generates huge volumes of litigation is also not accurate. In my experience, and according to several surveys of NEPA litigation, the number of cases filed is proportionately very small in comparison to the thousands of Federal actions decided upon in a given year. As shown in the table below, according to CEQ litigation reports for 2001–2013, there are few cases filed and few cases

²¹ See Council on Environmental Quality, *Environmental Quality: 25th Anniversary Report*, 1996, p. 51, available at https://ceq.doe.gov/publications/effectiveness_study.html.

²² Litigation Surveys for 2001 through 2013, available at <https://ceq.doe.gov/ceq-reports/litigation.html>.

where a proposed project or activity is stopped from proceeding pending further action by either the court or the agency.²³

Year	Number of NEPA Cases Filed	Number of Injunctions/Remands
2001	136	30
2002	148	40
2003	140	32
2004	167	32
2005	118	43
2006	108	72
2007	86	49
2008	132	35
2009	97	23
2010	87	16
2011	94	21
2012	88	10
2013	96	14

NEPA actually generates a relatively small volume of litigation with concerned parties typically filing about 100–150 NEPA lawsuits per year. The proportionately low percentage of cases filed was further confirmed when the Forest Service, in support of its Environmental Analysis and Decision-Making Initiative, compiled data between Fiscal Years 2009 and the first quarter of 2017 and found that it was sued on less than 3 percent of all projects.²⁴

Given the broad range of members of the public with interests affected by Federal actions, the types of plaintiffs bringing NEPA suits include states and state agencies, local governments, business groups, individual property owners, and Indian tribes, and public interest groups. This last category, public interest groups, comprise the largest number of plaintiffs and range in size from small local citizen groups organized around a particular issue or project to large environmental organizations.

Even the tiny fraction of NEPA actions that give rise to court suits overstates the significance of litigation because only a few of these suits result in court orders blocking government action. According to data compiled by CEQ, injunctive relief was not given in the majority of NEPA cases. The term “permanent injunction” is misleading in this context because such a final court order imposes only a temporary delay until the agency revises its environmental review to comply with NEPA and takes that information into account in reviewing the proposed action. Further, the courts have ordered a remand of certain issues to the Federal agency in only a relatively small number of cases and remands also provide the agency the opportunity to revise the NEPA review.

Some argue that the high percentage of cases won by the Federal agencies indicates that litigation is abused. While it is true that in a substantial percentage of cases the courts have ruled in favor of the defendant agencies and uphold the agency NEPA work, it is equally true that there are a good number of cases where the courts have found—despite courts’ deference to the Federal agencies’ NEPA work—that plaintiffs’ challenges had merit.

²³ See <https://ceq.doe.gov/ceq-reports/litigation.html>. See also P.E. Hudson & Lucinda Low Swartz, *2016 NEPA Cases*, NAEP Annual National Environmental Policy Act (NEPA) Report, National Association of Environmental Professionals, June 2017, p. 31–32 (This paper reflects a consistently low number of annual appellate NEPA case decisions ranging from 14 to 28 a year, and an 11 year total of fewer than 250).

²⁴ *Forest Service Environmental Analysis and Decision-Making Initiative*, USFS, 2017, available at <https://vimeo.com/237902205> at 52:24.

NEPA's critics also routinely disparage the motivations of plaintiffs who challenge agency environmental reviews. The rules of civil procedure require counsel in any litigation to certify, based on reasonable inquiry, that the action is not brought for any improper purpose, such as to harass or to cause unnecessary delay or needless cost, and that the claims presented have a sound basis in fact and law. I am not aware of any court sanctioning a NEPA plaintiff for bringing a frivolous complaint, or for filing suit for improper purpose, such as mere delay.²⁵

Litigation is expensive and time-consuming. In my experience it is generally the last resort that citizens, local governments (such as county commissioners) and conservation groups invoke after they have been unsuccessful in getting the agency to address their serious concerns during the NEPA review. Moreover, environmental plaintiffs understand that they face an uphill battle as NEPA requires only reasonable, good-faith consideration and disclosure of environmental consequences and that a Federal court will not substitute its judgment for that of the agency on the wisdom of a proposed project. They also appreciate that courts will almost always give the Federal agency the opportunity to revisit and revise its NEPA review. Consequently, for plaintiffs, a successful outcome occurs when the agency is required to correct the NEPA review by fully evaluating and disclosing the environmental impacts of a proposed action which may lead to a different, more environmentally-sensitive approach—for example, adoption of an alternative with less environmental impact, or commitment of additional mitigation. Litigation seeking a better outcome is based on the belief that identification and disclosure of environmental consequences will have an environmentally-beneficial effect on government decision making, just as Congress envisioned when it enacted NEPA.

LITIGATION EXAMPLES ADDING VALUE

The following are summaries of some cases where NEPA litigation led to a better outcome. As I stated earlier, cases can be found when NEPA takes too long or litigation delays a project; however, outliers do not tell the whole story. Actions taken to change the NEPA process or access to the courts that do not address the real causes of delay are both premature and ill-advised. I strongly believe key factors causing delays include the lack of capacity and resources. The cases below provide examples of the value provided by a legal remedy when a Federal agency's NEPA process is insufficient or inadequate.²⁶

Colorado: Canyons of the Ancients National Monument

The Canyons of the Ancients National Monument in southwestern Colorado contains over 6,000 archaeological sites representing Ancestral Puebloan and other Native American cultures. As a result of the designation, the existing oil and gas leases on the land were permitted to run their course but would not be renewed. On the eve of the lease's expiration, the lessees proposed a new seismic exploration project for the land. However, the Bureau of Land Management's (BLM) Environmental Assessment was allegedly based on inadequate cultural resource surveys, and, as a result, allowed exploration on the edges of several sensitive sites and artifacts. In an effort to protect these irreplaceable areas, a coalition of groups led by San Juan Citizens Alliance filed suit in Federal district court and were granted an emergency injunction. Negotiations between all stakeholders ensued, with conservation groups, BLM, and the lessees coming to the table to work out a compromise. The result of the negotiations structured an exploration project that enabled lessees to obtain the seismic information they needed while avoiding the National Monument's most significant cultural features and fragile habitats. All in all, it was a win-win that balanced energy exploration with cultural resource protection, and exemplifies effective multiple-use management of the public lands.²⁷

Florida: Scripps Research Institute Florida

In October 2003, Palm Beach County and Scripps Research Institute jointly developed plans for a Biotechnology Research Park to be built on the Mecca Farms site—a 1,919-acre parcel in rural western Palm Beach County bordered by wetlands

²⁵ See also Robert G. Dreher, *Testimony Before the Task Force on Updating the National Environmental Policy Act, Committee on Resources, Hearing on NEPA: Lessons Learned and Next Steps*, November 17, 2005, available at <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1100&context=cong>.

²⁶ Examples of NEPA success stories and benefits not including litigation are available at <https://ceq.doe.gov/get-involved/success-stories.html>.

²⁷ *New Energy Project at Monument*, Los Angeles Times, August 13, 2002, available at: <http://articles.latimes.com/2002/aug/13/nation/na-drill13>; *Energy Exploration Approved in Colorado Monument*, Institute for Agriculture and Trade Policy, September 25, 2002, available at: <https://www.iatp.org/news/energy-exploration-approved-in-colorado-monument>.

and conservation areas. In addition, Mecca's wetlands drain into the Loxahatchee River, a nationally designated Wild and Scenic River and an essential component of the Everglades Ecosystem. In order to develop the area, Palm Beach County and Scripps sought approval of a Clean Water Act Section 404 permit from the U.S. Army Corps of Engineers to fill wetlands at the Mecca Farms. The Corps issued the permit in 2005 based upon an EA concluding there were no significant environmental impacts associated with filling the wetlands. However, the Corps' EA—designed to identify any significant impacts a project may have on both the environment and public health—had been limited to only 25 percent of the 1,919 acre Mecca Farms site. Environmental groups—who had brought the matter to the Corps' attention during the agency process—challenged the adequacy of the EA under NEPA. In 2005, a District Court held that the Corps' issuance of the permit had violated both the National Environmental Policy Act and Clean Water Act and ordered preparation of a new environmental review before the project could proceed. During the ensuing evaluation process, Palm Beach County and Scripps decided to relocate the research park to a new location that minimized environmental impacts and saved money by utilizing existing access roads. The grand opening of the new facility took place on February 26, 2009, and today the Scripps Florida Research Institute operates a state-of-the-art biomedical research facility focusing on neuroscience, cancer biology, medicinal chemistry, drug discovery, biotechnology, and alternative energy development employing more than 500 research staff.²⁸

Minnesota: Central Corridor Light Rail

The Central Corridor Light Rail is a 10.9-mile light rail transit line connecting downtown Minneapolis and St. Paul. Running along University Avenue for most of the route, the project included construction of 18 new stations. In January 2011, the NAACP filed suit against the U.S. Department of Transportation (DOT) and the Metropolitan Council (the regional transit authority) claiming that the final environmental impact statement for the project was inadequate, in part because it failed to analyze the short-term impact of project construction on surrounding businesses. Specifically, the businesses were concerned with the project's removal of street parking, which would prevent customers from patronizing their stores. In response, the DOT used the NEPA process to hold town meetings, hearings, and otherwise engage the community, resulting in a supplemental EIS that suggested a range of mitigation measures to help small businesses resulting in providing help to small, affected local businesses in the corridor cope with the impacts of construction and loss of street parking.²⁹

Washington State: Huckleberry Land Exchange

Under the proposed Huckleberry Land Exchange, the U.S. Forest Service would trade nearly 7,000 acres of mature and old-growth forest in Washington's Mt. Baker-Snoqualmie National Forest, including a portion of the Muckleshoot Tribe's historic Huckleberry Divide Trail, for about 30,000 acres of high-elevation land held by Weyerhaeuser Timber Company. Citizen groups and the Muckleshoot Indian Tribe challenged this proposal. The court found that the Forest Service violated NEPA by failing to consider an adequate range of alternatives and by neglecting to analyze the cumulative impacts of the proposed exchange. As a result, the Forest Service improved their analysis and altered their plans for carrying out the exchange. Ultimately, the Huckleberry Land Exchange went forward with a better design that protected old-growth forest and culturally and recreationally important public lands.³⁰

²⁸*Florida Wildlife Federation v. U.S. Army Corps of Engineers*, 404 F.Supp.2d 1352 (2005). Available at: <https://www.courtlistener.com/opinion/2315811/florida-wildlife-federation-v-us-army-corps-of-engineers>.

²⁹*St. Paul Branch of NAACP v. U.S. DOT*, 764 F. Supp. 2d 1092 (2011); see also <https://metro council.org/Transportation/Projects/Light-Rail-Projects/Central-Corridor/Environmental.aspx>.

³⁰*Muckleshoot Indian Tribe v. Forest Service*, 177 F. 3d 800 (9th Cir. 1999); see also <http://elawreview.org/case-summaries/muckleshoot-indian-tribe-v-united-states-forest-service>.

QUESTIONS SUBMITTED FOR THE RECORD BY REP. GRIJALVA TO HORST GRECZMIEL,
FORMER CEQ ASSOCIATE DIRECTOR OF NEPA OVERSIGHT

Question 1. Can you please provide specific examples of how the NEPA process has saved Federal tax dollars by bringing to light information that led to cheaper, more efficient projects?

Answer. Case studies and compilations of success stories provide examples that show the value of using the NEPA process to engage the public, organizations, and other government entities. The five examples below show that alternatives to the initial proposed action shaped by collaboratively engaging the public can address the purpose and need for the proposed project in a way that is less impactful on the human environment and lead to more efficient projects that can include reduced and avoided costs.

Highway 26 Bypass

Highway 26 is a regional road that runs through south-central Wisconsin, connecting Illinois to Wisconsin's Fox River Valley. To address increasing traffic from trucks and regional drivers on the road, Wisconsin's Department of Transportation (WisDOT) proposed the construction of a bypass. NEPA provided the opportunity for stakeholders to engage in discussions about the project development. "NEPA forces us into providing alternatives that are representative of the interests of all agencies involved," said James Oeth, WisDOT project manager. As stipulated by NEPA, several alternatives were selected, studied in detail, and made available for public comment. "Without NEPA, we would have just asked what the shortest distance was and built the road through there," said Oeth.

The final decision created a route with the least impact and disruption to the community. For example, while the original route would have plowed through Ed McFarland's dairy farm, which sits west of Watertown, the final plan navigated around it. "Public involvement helped us . . . the less land we lose, the better," said McFarland. Additionally, under the final plan, the bypass skirted the community's urban service area, instead of destroying pristine land. While not all of the community's major requests were accommodated, residents appreciated the opportunity to be involved in the process. "I believe NEPA allowed for these alterations to take place," said Andy Didion, a Jefferson resident. "The DOT is getting much better and realizing this affects people's lives." "We talked out problems and came up with solutions that were agreeable to most participants," stated Greg David, a Jefferson County Supervisor. "The NEPA process has saved us a lot of money and mitigated many of the externalized consequences of a freeway expansion project."¹

Lakeview-Reeder Roads Project

In Idaho, the Forest Service proposed the Lakeview-Reeder Roads project to improve fish passage in Priest Lake and reduce sedimentation as part of a Healthy Forest Restoration Project. Public participation in the plan's NEPA review brought to light a discrepancy between the planned and the required buffer zone for the protection of the endangered boreal toad. In response, the Forest Service redesigned the proposed road maintenance and construction to adequately protect the species.² By informing the public of its plan, listening to citizen comments, and modifying the proposed project, the Forest Service avoided irretrievably committing taxpayer dollars to a project that violated Federal laws, thereby preventing possible litigation and a waste of taxpayer money.

Paris Pike

Kentucky's Paris Pike is a scenic road between Lexington and Paris that runs for 13.5 miles through rolling hills dotted with historic thoroughbred horse farms. However, its beauty was overshadowed by congestion and safety hazards, such as a lack of passing and turning lanes. The initial proposed project called for a standard four-lane highway but faced opposition from local communities concerned about irreparable harm to the historic corridor's natural landscape. A judge agreed with the communities and called for revisiting the planning process and developing a

¹*The Road to Better Transportation Projects, Wisconsin Highway 26 Bypass, NEPA Brings Communities to the Table*, Sierra Club website, retrieved May 2, 2018, from <http://vault.sierraclub.org/sprawl/nepa/wisconsin.asp>.

²*Idaho Panhandle National Forest NEPA Projects: Lakeview-Reeder HFRA Project*, U.S. Forest Service website, retrieved May 2, 2018 from https://data.ecosystem-management.org/nepaweb/nepa_project_exp.php?project=6258; *Lakeview-Reeder Roads Record of Decision*, U.S. Forest Service, December, 2009, available at: https://www.fs.usda.gov/nfs/11558/www/nepa/6430_FSPLT1_017770.pdf.

workable alternative. As a result, a design was developed that fit the aesthetics and contours of the land while minimizing environmental impacts.

The new design, which has won national awards, added a shoulder; preserved existing trees, fences, and stone walls; and installed additional walls and guardrails to increase safety and enhance the highway's aesthetics. The new design also converted a historic farmhouse into a visitors' center, generating tourism dollars for a community that would have lost money if the original project had been implemented. "It has been an immensely successful project," said Cumberland Sierra Club chapter chair Lane Boldman. "It preserved aesthetic integrity while doing what it was supposed to do: increase safety and capacity. It has significantly improved the corridor." Local resident Hank Graddy said the NEPA process was essential, noting that it "brought people and ideas to the table that otherwise would not have been there." Paris Pike represents a true compromise facilitated by the NEPA process: road expansion without accompanying aesthetic and natural destruction.³

Scripps Research Institute

Palm Beach County Florida and Scripps Research Institute jointly developed plans for a Biotechnology Research Park to be built on the Mecca Farms site—a 1,919-acre parcel in rural western Palm Beach County bordered by wetlands and conservation areas. Mecca's wetlands drain into the Loxahatchee River, a nationally designated Wild and Scenic River and an essential component of the Everglades Ecosystem. In order to develop the area, Palm Beach County and Scripps sought approval of a Clean Water Act Section 404 permit from the U.S. Army Corps of Engineers to fill wetlands at the Mecca Farms. The Corps issued the permit in 2005 based upon an EA concluding there were no significant environmental impacts associated with filling the wetlands. However, the Corps' EA—designed to identify any significant impacts a project may have on both the environment and public health—had been limited to only 25 percent of the 1,919 acre Mecca Farms site. Environmental groups—who had brought the matter to the Corps' attention during the agency process—challenged the adequacy of the EA under NEPA.

The District Court held that the Corps' issuance of the permit had violated both the National Environmental Policy Act and Clean Water Act and called for the preparation of a new environmental review before the project could proceed.⁴ During the ensuing evaluation process, Palm Beach County and Scripps decided to relocate the research park to a new location that minimized environmental impacts and saved money by utilizing existing access roads. The grand opening of the new facility took place on February 26, 2009,⁵ and today the Scripps Florida Research Institute operates a state-of-the-art biomedical research facility focusing on neuroscience, cancer biology, medicinal chemistry, drug discovery, biotechnology, and alternative energy development employing more than 500 research staff.

Crenshaw/LAX Transit Corridor Project

When construction is completed in 2019, the Crenshaw/LAX line in Los Angeles CA will run from the Jefferson Park neighborhood in the north to Inglewood and El Segundo in the south and add a long-sought rail connection from downtown to one of the busiest airports in the world. Without the approval of "Measure R," a half-cent sales tax approved by Los Angeles County voters in 2009 that provided a dedicated funding for 12 metro area transit projects, the city wouldn't have had the money to proceed. Early project planning and work on the Environmental Impact Statement (EIS) to construct the 8.5-mile line connecting two existing subway lines began in 2009. During this review process, the Federal Transit Administration (FTA) and Los Angeles Metro officials considered public concerns and identified a rarely used 5-mile long freight rail line instead of building new tracks that would have disrupted several neighborhoods and proven far costlier. That decision decreased project costs, saved time, and reduced disturbances for the nearby community by using an existing right-of-way.

³Raymond Werkmeister and Donn Hancher, *The Paris to Lexington Road Reconstruction Project*, University of Kentucky College of Engineering Kentucky Transportation Center, Sept. 2001, available at http://www.e-archives.ky.gov/pubs/transportation/tc_rpt/ktc_02_02_fr79_96_1f.pdf; See also Transportation Research Board presentation retrieved May 2, 2018, from <https://trid.trb.org/view/650514>.

⁴*Florida Wildlife Federation v. U.S. Army Corps of Engineers*, 404 F.Supp.2d 1352 (2005), available at: <https://www.courtlistener.com/opinion/2315811/florida-wildlife-federation-v-us-army-corps-of-engineers>.

⁵*Opening Ceremonies Celebrate New Scripps Florida Biomedical Research Facilities*, The Scripps Research Institute, February, 2009, available at: <https://www.scripps.edu/news/press/2009/022609.html>.

Throughout the environmental review and planning process, local residents were engaged to ensure the project would be completed in an equitable, beneficial, and resourceful way that met the needs of local communities. For example, a station was added to service Leimert Park Village, an important cultural center for black residents of Los Angeles, and the Crenshaw/LAX Community Leadership Council ensured that community issues are considered throughout the planning process.⁶ As one of the Federal Transit Administration's first projects piloting a new process to help identify and mitigate project risks more efficiently, the project's EIS was finalized in less than 2 years in 2011 and the Crenshaw/LAX light-rail alternative moved forward.⁷

Northwest Corridor Project

In 2007, the Federal Highway Administration and Georgia Department of Transportation (GDOT), in cooperation with other state and Federal agencies, proposed to expand I-75 and I-575 in the Atlanta metropolitan area's Northwest Corridor to alleviate traffic congestion in one of the region's most congested thoroughfares. When completed later this year, the Northwest Corridor Project (NWCP) is expected to be the most expensive highway project in Georgia's history at nearly \$1 billion, adding nearly 30 miles of reversible lanes along I-75 and I-575 through Cobb and Cherokee counties. The initial design plan proposed an even larger project, expanding sections of I-75 and I-575 from 6 to 10 lanes by adding 4 general-purpose lanes. Community members using the NEPA review process to express their environmental, public health, and economic concerns about the project led the Georgia Department of Transportation (GDOT) to make improvements to the plan.⁸

Instead of adding new lanes, GDOT's final designed plan called for the conversion of the existing medians and road space on I-75 into reversible HOV traffic lanes—modifications that will save a significant amount of money. In addition, the NWCP modifications minimized adverse effects on low-income and minority communities by reducing the number of residences and businesses displaced from over 300 to 18, and reduced the project's impact on the nearby wetlands that are home to an endangered species from 4.2 to 0.3 acres. Thanks to the NEPA public review process, the NWCP has fewer impacts on local homes, businesses, and the environment, and is *more cost-effective than the original plan*. Construction broke ground in October 2014 and the project is anticipated to fully open to traffic later this year.

Question 2. Can you explain the purpose and value of the CEQ's 2016 Greenhouse Gases and Climate Change Guidance, and what impacts we can expect to see with its recent withdrawal?

Answer. The guidance came about, at least in part, as a result of three converging factors. First, the public, the scientific community, and the courts are increasingly recognizing the importance of greenhouse gas emissions and climate change as an environmental issue and characterizing the effects as significant.⁹ The growing number of court cases reflect the view that the NEPA process is an appropriate venue to address the issue.¹⁰ Cases, however, are fact specific and result in varied approaches to address when and how analysis of those issues is appropriate.¹¹

⁶*Community Organizations Shed Light On New Crenshaw District*, Los Angeles Sentinel, December 2, 2015, available at: <https://lasentinel.net/community-organizations-shed-light-on-new-crenshaw-district.html>; see also *About the Crenshaw/LAX Community Leadership Council (CLC)*, Los Angeles County Metropolitan Transportation Authority website retrieved May 4, 2018, from https://www.metro.net/projects/crenshaw_corridor/clc-about/.

⁷*Final Environmental Impact Statement/Final Environmental Impact Report: Crenshaw/LAX Transit Corridor*, Federal Transit Administration, August 31, 2011, available at: http://media.metro.net/projects_studies/crenshaw/images/FEIS_FEIR/00_Cover_Table_of_Contents.pdf; *Record of Decision: Crenshaw/LAX Transit Corridor*, Federal Transit Administration, December 30, 2011, available at: http://media.metro.net/projects_studies/crenshaw/images/20111230_CrenshawLAX_Record_of_Decision.pdf.

⁸*Final Environmental Impact Statement Reevaluation: Northwest Corridor Project*, Federal Highway Administration and Georgia Department of Transportation, October 2011. Available at: <http://nwcproject.com/media/pdfs/REEVAL/FEISReeval13.pdf>; *Record of Decision: Northwest Corridor Project*, Federal Highway Administration and Georgia Department of Transportation, May 2013, available at http://www.nwcproject.com/media/pdfs/NWCP_ROD_2013.pdf.

⁹For example, see the Intergovernmental Panel on Climate Change website, retrieved May 2, 2018, from <http://www.ipcc.ch/>.

¹⁰For example, see *Border Power Plant Working Group v. DOE*, 260 F. Supp. 2d 997 (S.D. Cal. 2003).

¹¹Michael B. Gerrard, *Survey of Climate Change Litigation*, New York Law Journal, Sept. 28, 2007, available at <https://files.arnoldporter.com/arnold%20&%20porter%20lp.survey%20of%20climate%20change%20litigation.new%20york%20law%20journal.september%2028%202007.pdf>.

Second, CEQ was asked to provide guidance by Federal agencies and the public.¹² CEQ was also formally petitioned to consider regulations and guidance on analyzing GHG emissions and the impacts of climate change under NEPA.¹³ And third, a major CEQ role is the oversight of Federal agencies' implementation of NEPA.¹⁴ Without enforcement authority, CEQ maintains that role through its leadership and the support of the agencies and the public by addressing and helping to overcome challenges that impede Federal agencies' ability to prepare useful and timely environmental reviews.

Throughout its history, CEQ has been shown deference by the courts when speaking to how agencies can meet their responsibilities under NEPA and the CEQ NEPA Regulations.¹⁵ Consequently, in the face of the continued challenges to when and how agencies were to address greenhouse gas emissions and climate change, CEQ had the opportunity—and the responsibility—to issue guidance that would clarify the matter.

CEQ issued the guidance to provide for greater clarity and more consistency in how agencies address climate change in the environmental impact assessment process. Climate change was acknowledged as a fundamental environmental issue with effects that should be analyzed under NEPA.¹⁶ Although climate change is a particularly complex challenge given its global nature and the inherent interrelationships among its sources, causation, mechanisms of action, and impacts, the guidance recognized that analyzing a proposed action's GHG emissions and the effects of climate change relevant to a proposed action—particularly how climate change may change an action's environmental effects—could provide useful information to decision makers and the public. The guidance used long-standing NEPA principles because such an analysis should be similar to the analysis of other environmental impacts under NEPA.

Furthermore, the guidance used a reasoned practical approach to ease the burden of developing complex analyses by recommending agencies use available tools to project GHG emissions, and where applicable carbon sequestration, as a proxy for assessing potential climate change effects. The guidance also advised agencies to use existing available information when assessing the potential future state of the environment rather than undertaking new research and thereby extending the review process. In short, the guidance provides a pathway for agencies to comply with NEPA through more focused, shorter, and less resource intensive means than were becoming the norm in order to address the many different stakeholder views and court rulings.

Withdrawing the guidance leaves the agencies without clear direction on what should be analyzed and how intensive that analysis should be. The result is longer documents containing differing analyses that are subject to challenge along with less clarity for decision makers, project sponsors, and the public. The hope is that the current Administration's notice that the guidance was withdrawn for further consideration¹⁷ will result in new or revised guidance that furthers the ability of agencies to address GHG emissions and climate change in a practical and reasoned manner. In the absence of such guidance, I fear we will continue to see the development of different requirements and interpretations by different agencies and courts

¹² *Recommendations of the State, Local, and Tribal Leaders Task Force on Climate Preparedness and Resilience*, November 2014, at page 20 (recommendation 2.7) available at <http://www.adaptationclearinghouse.org/organizations/state-local-and-tribal-leaders-task-force-on-climate-preparedness-and-resilience.htm>; see also *Future Federal Adaptation Efforts Could Better Support Local Infrastructure Decision Makers*, Government Accountability Office, Apr. 12, 2012, available at <https://www.gao.gov/products/GAO-13-242>.

¹³ International Center for Technology Assessment, Natural Resources Defense Council, and Sierra Club, *Petition Requesting That the Council on Environmental Quality Amend its Regulations to Clarify That Climate Change Analyses be Included in Environmental Review Documents*, Feb. 28, 2008 (the petition requested CEQ issue guidance and the petition to amend the regulations was denied on August 7, 2014).

¹⁴ 42 U.S.C. 4344.

¹⁵ *Associations Working for Aurora's Residential Env't v. Colorado Dep't of Trans.*, 153 F.3d 1122, 1127 n. 4, 28 ELR 21459 (10th Cir. 1998); see also *Andrus v. Sierra Club*, 442 U.S. 347 (1979) ("CEQ's interpretation of NEPA is entitled to substantial deference.").

¹⁶ NEPA recognizes "the profound impact of man's activity on the inter-relationships of all components of the natural environment." (42 U.S.C. 4331(a)). It was enacted to, inter alia, "promote efforts which will prevent or eliminate damage to the environment biosphere and stimulate the health and welfare of man." (42 U.S.C. 4321).

¹⁷ 82 FR 16576, Apr. 5, 2017, available at <https://www.federalregister.gov/documents/2017/04/05/2017-06770/withdrawal-of-final-guidance-for-federal-departments-and-agencies-on-consideration-of-CFR1501.8greenhouse-gas>; note that the withdrawn guidance is still available on https://ceq.doe.gov/guidance/ceq_guidance_nepa-ghg-climate_final_guidance.html as is the webpage on GHG emissions accounting tools: <https://ceq.doe.gov/guidance/ghg-accounting-tools.html>.

that will make consistent approaches more difficult and lead to longer, less focused, and less timely NEPA reviews.

Question 3. During the 2018 State of the Union, President Trump called for legislation that would reduce the Federal permitting process for infrastructure projects “to no more than 2 years, and perhaps even 1.” Do you believe that a lack of mandated timelines is actually a hurdle to efficient environmental review?

Answer. When agencies have adequate resources and training, I believe that project specific non-mandatory timelines, or schedules, can facilitate the timely development of efficient NEPA environmental reviews. Mandated timelines with monetary penalties or “automatic approvals” for not meeting deadlines do not do so.

The CEQ NEPA Regulations provide for time limits¹⁸ and the timing of the NEPA review.¹⁹ What was true when the CEQ NEPA Regulations were established in 1978 remains true today—specific time limits for the entire NEPA process are too inflexible and individual proposed projects vary due to numerous factors (e.g., location, design, environmental impact). Consequently, imposing a one-size-fits-all approach is impractical. The recent One Federal Decision Memorandum of Understanding, builds on the efficiencies provided for in CEQ NEPA Regulations²⁰ and uses existing rules and best practices such as pre-scoping, milestones (non-mandatory schedules) and early dispute resolution, to provide for more coordinated and timely environmental reviews and authorization processes.²¹

While there is value in setting time goals based on similar projects, non-mandatory goals are preferable. There is a real risk that mandating a time for a decision can lead to either rushed decisions that do not fully consider nor seek to avoid negative environmental consequences, or denials to avoid making uninformed decisions vulnerable to challenges for incomplete information or analyses.

A timeline should, at a minimum, provide opportunities to stop-the-clock when appropriate: for example, when applicants need time to provide additional information relevant to the NEPA review of a requested approval or permit; when a state takes time to identify matching funds; or when a pending state, local, or tribal approval or permit is necessary for a proposed project to proceed. Most importantly, until agencies are provided adequate resources and training to conduct efficient and timely NEPA reviews, agencies will continue to struggle to prepare timely NEPA reviews.

Question 4. Do you believe that mandated timelines would lead to speedier project completion for most projects?

Answer. I do not believe that mandated timelines would lead to speedier project completion. In addition to my response above, it is important to remember that a multitude of factors other than undertaking NEPA compliance affect the timing of Federal project delivery and that once the NEPA review is completed, and the project decided upon, the project must still be implemented.

In my experience factors that can cause delay include lack of funding; changes in the design or planning processes; inadequate staff capacity to implement or oversee the NEPA process; changes in priorities that keep a proposed project from proceeding; local controversy or local opposition to a project; or delays in other (non-NEPA) permitting or approval processes at the Federal, state, tribal, or local level. With regard to the latter, certain Federal actions such as highway construction projects and permitting for mining operations, cattle grazing, forest thinning, and energy development may require compliance with other statutory and regulatory requirements that can add time, especially if they are raised late in the environmental review process. This is particularly the case when such review or permitting requires the participation or input of increasing numbers of local, state, tribal, or Federal agencies. In addition, agencies responsible for protecting resources are often confronted by problems with the project’s alternatives analysis, incorrect or incomplete information, disagreements or differences of opinion among agencies, poor

¹⁸ 40 CFR 1501.8.

¹⁹ 40 CFR 1502.8.

²⁰ *Memorandum for Heads of Federal Departments and Agencies: Improving the Process for Preparing Efficient and Timely Environmental Reviews under the National Environmental Policy Act*, CEQ, Mar. 6, 2012, available at: https://ceq.doe.gov/docs/ceq-regulations-and-guidance/Improving_NEPA_Efficiencies_06Mar2012.pdf.

²¹ *Memorandum of Understanding Implementing One Federal Decision Under Executive Order 13807*, April 2018, available at <https://www.ferc.gov/legal/mou/2018/MOU-One-Federal-Decision.pdf>.

communication with project proponents and other agencies, or the environmental or biological analyses associated with the project.²²

More often than not, factors other than complying with NEPA or the NEPA Regulations are the reasons for delaying projects. Those factors remain regardless of any mandated timelines for Federal permitting and environmental reviews. Coordinated schedules and timelines tailored to specific projects with the ability to stop-the-clock for appropriate time periods, coupled with ensuring agencies have the capacity to prepare effective and timely reviews and permits, offers a better approach to improve timeliness.

Question 5. Do you think there would be negative environmental impacts caused by this kind of mandated time limit?

Answer. In addition to my responses above, mandated time limits would cause agencies to decrease the amount of time for two specific aspects of NEPA. Public engagement and the consideration of alternatives are often pointed to as two of the most time-consuming aspects of a NEPA review and would, in my opinion, most likely be curtailed by either reducing time for public engagement and comment periods or reducing the number of alternatives considered. The value of engaging the public and considering reasonable—technically and economically feasible—alternatives is significant. This has been demonstrated by case studies—success stories—that show the benefits, and the avoidance or reduction of adverse impacts, to communities and the human environment.²³ Furthermore, engaging the public in reviewing and developing alternatives results in a better understanding of the Federal agency and its actions, leading to greater community support for the final decision.

At the September 15, 2010, celebration of the 40th Anniversary of NEPA sponsored by the Environmental Law Institute and the Partnership Project, both Russell Train and Congressman John Dingell reflected on the value of NEPA.²⁴ Russell Train, former Administrator of the Environmental Protection Agency and the first Chairman of the Council on Environmental Quality, found that National Environmental Policy Act (NEPA) successes demonstrate “how public involvement and careful consideration of alternatives has produced better outcomes—for the agencies themselves, for the nation, and for the human environment.” “NEPA covers every situation that we confront,” Representative Dingell said. “Despite attacks over the years, people realized the tremendous success of the statute.”

It is encouraging to note that a recent study of oil and gas development showed that NEPA adds value by reducing certain media specific impacts more than would be the case by relying solely on existing substantive laws such as the Clean Air Act and Clean Water Act. That study also showed that having more alternatives to evaluate leads to greater benefits such as protecting more wetlands, disturbing less lands, and improving air quality.²⁵

In closing, I believe there is a real risk that mandating a time for a decision will lead to rushed decisions that do not fully consider nor seek to avoid negative environmental consequences.

Mr. THOMPSON. Mr. Greczmiel, thank you very much.
The Chair now recognizes Mr. Coleman to testify.

²² See, for example, *The Role of the Environmental Review Process in Federally Funded Highway Projects: Background and Issues for Congress*, CRS 7-5700, R42479, April 11, 2012, p. 36, available at https://environment.transportation.org/pdf/proj_delivery_stream/crs_report_envrev.pdf.

²³ See for example: *NEPA Success Stories: Celebrating 40 Years of Transparency and Open Government*, Environmental Law Institute, 2010, available at [https://ceq.doe.gov/docs/get-involved/NEPA Success Stories.pdf](https://ceq.doe.gov/docs/get-involved/NEPA%20Success%20Stories.pdf).

²⁴ <https://obamawhitehouse.archives.gov/administration/eop/ceq/initiatives/nepa/symposium>.

²⁵ John Ruple and Mark Capone, *NEPA—Substantive Effectiveness Under a Procedural Mandate: Assessment of Oil and Gas EISs in the Mountain West*, *George Washington Journal of Energy & Environmental Law*, Winter 2016.

**STATEMENT OF JAMES COLEMAN, PROFESSOR, SOUTHERN
METHODIST UNIVERSITY, DEDMAN SCHOOL OF LAW,
DALLAS, TEXAS**

Mr. COLEMAN. My thanks to the Committee. There are a lot of studies and statistics about the National Environmental Policy Act process, but I don't think any of us in this room disagree about those statistics. We are all using the same stats. There are about 200 major infrastructure projects every year that require an environmental impact statement. If you look at the reviews that ended in the year 2016, the average review takes a little bit over 5 years.

So, the two questions for the Committee to consider today are, first, should each of these projects have to wait so long for their environmental approval; and second, if not, is there anything that Congress can do about it?

On the first question, there has been some bipartisan agreement. Both parties have said these reviews take too long. For the last 20 years, Democratic and Republican Congresses, President Bush and President Obama passed laws and issued orders to try to streamline these reviews. Congress and the President have asked agencies to track projects, to streamline reviews, and to set deadlines, but so far the environmental reviews are just getting longer.

Under President Bush, the average review took 3½ years. By the end of President Obama's term, the average review took more than 5 years. And that is the average review for projects completed in 2016. We know that these reviews are getting longer each year. So, if you were to enter a review process today, how long would it take to complete? It is probably going to be 6 years, maybe potentially longer.

So, why do these reviews keep getting longer? On that, I think we really need to listen to what the NEPA practitioners say, practitioners like Mr. Greczmiel. These reviews take time, so every time there is a proposal for streamlining reviews, NEPA practitioners say the same thing, "Well, that might just backfire, because if you try to do the reviews faster, the courts are going to strike down the reviews, and it is just going to take you more time."

And I think they might be right. Given how courts review NEPA claims, agencies may feel that unless they gold-plate their review, unless they really do far more than the statute was intended to require, the review will get struck down in court.

When outside groups challenge a permit under NEPA, more than half of those lawsuits are filed in the Ninth Circuit. And plaintiffs win a lot of those cases. Even if they don't win in district court, they might win in the court of appeals. It is a minority of cases, but it is a significant percentage.

In theory, if the government loses one of those challenges to a permit, it could appeal that loss to the Supreme Court. But the Supreme Court takes very few cases. NEPA has been around for about 50 years, and the Supreme Court has taken 17 NEPA cases.

What does the Supreme Court say when it takes those cases? It always says basically the same thing. In each of those cases, the Supreme Court has said first the government did enough review, the government has won each of those cases. In fact, almost all of those cases have been unanimous decisions of the U.S. Supreme Court. And second, the Supreme Court has said often, "Lower

courts, cut it out. Stop asking agencies to meet an impossible standard in these NEPA reviews.”

If you are an agency, however, you cannot count on getting that Supreme Court review, since they take so few cases. So, you might think, if I don’t want my analysis overturned, this over 5 years, soon-to-be 6 years of review overturned, I had better gild the lily. And if I am an investor looking at investing in one of these major infrastructure projects in the United States, I think if I want to build a major project in the United States it is probably going to take me 6 years for my environmental review. And even if I get it, there is a significant chance that I will be caught up in years of litigation.

Can Congress do anything about that? Well, let me offer two proposals.

First, for some natural gas projects, we have asked that if you file a NEPA challenge, you do it within a specified time period, and do it in the D.C. Circuit. I don’t know any reason why all projects aren’t as important as natural gas projects. What about a solar farm on Federal land, or what about a transmission project to support that solar farm? I think it is possible that all of those projects should be given expedited review in the D.C. Circuit.

The second proposal that I would offer is that at some point the NEPA challenges should end. So, if the government has issued a final environmental impact statement and it has been over 7 years, 8 years, 9 years, some point, that NEPA obligation should no longer be enforceable. Because, again, NEPA was intended to be a procedural requirement. It is not supposed to be a standard for whether projects are approved. So, I think that if you have done more than 6, 7, 8 years of review, that should be considered adequate.

Thank you, and I also look forward to your questions.

[The prepared statement of Mr. Coleman follows:]

PREPARED STATEMENT OF JAMES W. COLEMAN, ASSISTANT PROFESSOR, SOUTHERN METHODIST UNIVERSITY, DEDMAN SCHOOL OF LAW

The National Environmental Policy Act environmental review process is broken. The average time to complete an environmental impact statement under the Act is now over 5 years.¹ Whenever an investor considers building U.S. infrastructure that would require a Federal permit and impact statement, he or she must consider whether it is worth waiting 5 or more years. Will markets change over that time? Will the permit be further delayed by court challenges? Would it make more sense to invest in another country?

These environmental review delays are lengthening at the worst possible time for U.S. energy markets. Innovative U.S. companies have discovered ways of producing natural gas, oil, and renewable power far more cheaply. But U.S. consumers and producers will only benefit from these new, cleaner sources of energy if they can be connected to markets with new pipelines and power-lines. Across the country, new energy transport facilities are waiting for Federal permits to unlock the benefits of America’s new energy renaissance.²

The growing National Environmental Policy Act delays are simply unreasonable. In the countries that the U.S. generally views as environmental leaders, these

¹National Association of Environmental Professionals’ (NAEP’s) National Environmental Policy Act (NEPA) Practice, *NAEP Annual National Environmental Policy Act (NEPA) Report for 2016*, <http://www.naep.org/nepa-2016-annual-report>.

²James W. Coleman, *Pipelines & Power-lines: Building the Energy Transport Future*, 79 Ohio St. L.J. ____ (2018).

reviews generally take less than 2 years.³ Canada has recently proposed expanding the scope of its reviews and completing them in 300 days.⁴

Each successive administration has tried to address this slow-rolling disaster for investment in the U.S. economy. President George W. Bush issued executive orders and laws designed to expedite environmental reviews.⁵ President Obama also signed multiple bills and memoranda designed to urge faster environmental reviews.⁶ Finally, President Trump issued an executive order to streamline permitting and recently followed it up with a memorandum of understanding between agencies to speed environmental reviews.⁷

Thus far, these bipartisan efforts have failed. A 10-year 2008 study found that the average NEPA review took 3.4 years and was getting longer.⁸ A 2015 Department of Energy study found that the average NEPA review took over 4 years.⁹ The most recent study shows that these reviews now take over 5 years.¹⁰ As President Obama's regulatory czar put it, "If the permitting bureaucracy were a supervillain, it would be the Blob."¹¹

Right now, the Blob is winning: we have lost decades of investment while environment reviews grow longer and longer. How can we ensure that the U.S. does not fall behind our global competitors?

First, we must address the root cause of delay: judicial rulings that constantly demand more and more analysis in NEPA reviews. NEPA impact statements were once less than 10 pages¹² and current regulations say they should be under 150 pages.¹³ But four decades of judicial nitpicking has forced agencies to write longer and longer reviews—generally well over a thousand pages. Even a finding of no significant impact—a finding that a full environmental impact statement is not required because the project has no significant impact on the environment—can be well over a thousand pages.¹⁴

The threat of judicial review compounds the harm that extended reviews do to the national economy. Investors can count on waiting over 5 years for their permit, but even when they have it, it can be invalidated at any time by a lawsuit that will send them back to the agency to wait for a fix. And that fix will, of course, itself be subject to judicial review.

³ Philip K. Howard, *Two Years, Not Ten Years: Redesigning Infrastructure Approvals*, Common Good, September 2015, <https://www.commongood.org/wp-content/uploads/2017/07/2YearsNot10Years.pdf>.

⁴ Government of Canada, *A Proposed New Impact Assessment System*, <https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/environmental-assessment-processes.html> (describing proposal).

⁵ Executive Order 13274, *Environmental Stewardship and Transportation Infrastructure Project Reviews*, Sept. 18, 2002; Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (2005) Public Law No. 109–59.

⁶ Fixing America's Surface Transportation Act (2015), Public Law No. 114–94, Title XLI; Moving Ahead for Progress in the 21st Century Act (2012) Public Law No. 112–141. Exec. Order 13,604, *Improving Performance of Federal Permitting and Review of Infrastructure Projects*, Mar. 22, 2012, Executive Presidential Memorandum, *Expediting Review of Pipeline Projects from Cushing, Oklahoma, to Port Arthur, Texas, and Other Domestic Pipeline Infrastructure Projects*, Mar. 22, 2013.

⁷ Exec. Order 13,807, *Presidential Executive Order on Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure*, Aug. 15, 2017; Memorandum of Understanding Implementing One Federal Decision Under Executive Order 13807, <https://www.whitehouse.gov/wp-content/uploads/2018/04/MOU-One-Federal-Decision-m-18-13-Part-2-1.pdf>.

⁸ Piet Dewitt & Carole A. DeWitt, *How Long Does It Take to Prepare an Environmental Impact Statement?*, 10 *Environmental Practice* 164 (2008).

⁹ United States Department of Energy, *Lessons Learned Quarterly Report*, Mar. 2016, <http://energy.gov/nepa/downloads/lessonslearned-quarterly-report-march-2016>. A 2014 study from the U.S. Government Accountability Office found that the average time for a NEPA review was 4.6 years. U.S. Government Accountability Office, *Little Information Exists on NEPA Analyses*, Apr. 2014, <https://www.gao.gov/assets/670/662543.pdf>.

¹⁰ National Association of Environmental Professionals, *supra* note 1.

¹¹ Cass R. Sunstein, *Trump Did Something Good This Week*, Bloomberg (Aug 17, 2017) <https://www.bloomberg.com/view/articles/2017-08-17/trump-did-something-good-this-week>.

¹² Daniel A. Dreyfus, *NEPA: The Original Intent of the Law*, J. Prof. Iss. Eng'g Educ. & Prac. 109, no. 4 (1983), pp. 252–3.

¹³ 40 CFR § 1502.7.

¹⁴ U.S. Army Corps of Eng'rs, *Mitigated Finding of no Significant Impact*, Environmental Assessment Dakota Access Pipeline Project Williams, Morton, and Emmons Counties, North Dakota (Jul 2016), available at <http://www.energylawprof.com/wp-content/uploads/2017/03/DAPL-EA-VOL-1.pdf> & <http://www.energylawprof.com/wp-content/uploads/2017/03/DAPL-EA-Vol-2.pdf>.

Critics of NEPA streamlining now claim that if reviews are conducted more promptly, the courts will simply strike them down.¹⁵ Respectfully, if the courts believe that National Environmental Policy Act reviews should take a minimum of 5 years, then either the Act or its interpretation, must be changed. Americans, as part of the world's most litigious society, may have grown used to environmental reviews stretching over decades, but investors know that they can invest in other countries where the permitting system is more predictable.¹⁶

Second, we must be willing to consider legislative medicine strong enough to address the severity of the disease. For example, when a company is forced to wait an unreasonable length of time for a permit, that permit should eventually be immunized from invalidation under NEPA. After all, if a government issues an environmental impact statement and permit 6 years after a project is proposed, what is the benefit of allowing judicial review of that environmental impact statement? The environmental review took 5 years—seven times as long as a review would take in Canada. If a court believes that is still not enough review, what more would it like: 12 years of review?

And if the government's review is still truly inadequate after 6 years, why should the private company building the project be punished further? If the government had wanted to, it could have denied the permit at any time in the preceding 6 years. If it remained committed to the project through multiple administrations and successive congresses, what practical purpose is achieved by further delay?

If NEPA review was precluded after some interval—whether 6 years, 8 years, or 10—the government would still have an incentive to issue timely reviews. Project proponents do not want to wait 6 years for a permit—they would like their reviews and permitting completed within 1 or 2 years. But a time limit would solve the worst cases of delay and address investors' worst fears.

At a minimum, uncertainty for permit applicants should be reduced by expediting judicial review of NEPA lawsuits. Suits to invalidate permits using NEPA should be treated like challenges to Federal environmental regulation—suits should go straight to the Federal Courts of Appeal and should be filed within 60 days after the Federal permit is granted.

Third, we must resist the never-ending calls to further expand environmental reviews. The most recent effort is the call to consider the “upstream” and “downstream” impact of energy projects—going beyond the pipeline to consider how a pipeline will encourage energy use elsewhere. For example, advocates want the Federal Energy Regulatory Commission to calculate how natural gas pipelines encourage gas drilling upstream of the pipeline and encourage burning gas downstream of the pipeline. They say we should (1) estimate how much extra carbon dioxide these pipelines will encourage in other places and then (2) multiply that number by the social cost of carbon that was used under the Obama administration to find (3) a number for the climate harm encouraged by these projects.

This convoluted theory is an unhelpful distraction from the core environmental review process for pipelines.¹⁷ Pipeline reviews should maintain their traditional focus on environmental impacts from construction and operation of the pipeline. Between stream crossings, the danger of spills and explosions, and land-use impacts, there is plenty to consider in the already-delayed environmental review process.

By contrast, it is not possible to say how a single pipeline will impact oil or gas use in continent-wide energy markets. For example, if a pipeline or liquefied natural gas facility ships new gas to a foreign market, will that market burn less coal than it otherwise would have? Or will it build less wind power than it would have? These questions cannot be answered with any confidence.¹⁸

The futility of these reviews can be seen from the most careful and state-of-the-art “upstream” emissions review that has yet been attempted: the State Department's review of whether the Keystone XL pipeline would encourage oil production in Canada. The State Department reviewed this project for 7 years and finally concluded that the pipeline would probably not increase oil production in Canada—

¹⁵ Ellen M. Gilmer, *Critics on new leasing policy: 'BLM is inviting lawsuits'*, E&E News, Feb. 2, 2018, <https://www.eenews.net/stories/1060072713>.

¹⁶ Royal Economic Society, *The 'Litigious Society': Why Americans Spend More On Lawsuits Than Brits*, Jul 2005, <http://www.res.org.uk/details/mediabrief/4388681/The-Litigious-Society-Why-Americans-Spend-More-On-Lawsuits-Than-Brits.html>; Paul H. Rubin, *More Money Into Bad Suits*, N.Y. Times, Nov. 16, 2010, <https://www.nytimes.com/roomfordebate/2010/11/15/investing-in-someone-elses-lawsuit/more-money-into-bad-suits>.

¹⁷ James W. Coleman, *Beyond the Pipeline Wars: Reforming Environmental Assessment of Energy Transport Infrastructure*, 2018 Utah L. Rev. 119 (2018).

¹⁸ James W. Coleman & Sarah Marie Jordaan, *Clearing the Air: How Canadian Liquefied Natural Gas Exports Could Help the World Meet Its Climate Goals*, C.D. Howe Institute, Issue Brief (2016).

indeed it would likely lower worldwide emissions because, without it, the oil would just be transported by trains that emit more greenhouse gases than pipelines.¹⁹ But environmental groups accurately pointed out that, if one used different assumptions, one could reach different conclusions—under some assumptions the pipeline would increase oil production in Canada and worldwide greenhouse gas emissions.²⁰ Ultimately, the State Department decided that the pipeline should be rejected because, contrary to its own analysis, the pipeline would be “perceived as enabling further [greenhouse gas] emissions globally.”²¹ Seven years of review and the State Department’s best economic modeling of upstream emissions produced a result that even the Department decided was so hypothetical that it should be subordinated to contrary popular perception. This should not be the model for all energy transport project reviews.

Americans can still be proud that the Federal Government considers the environmental consequences of its action. And we can be proud of the expertise and care that goes into these environmental reviews. But Americans can only be dismayed as these already-overlong reviews grow lengthier. NEPA was once called the “Magna Carta” of environmental law.²² Congress must help it regain that legacy so that it does not become a “Bill of Pains and Penalties” for U.S. investment in the 21st century.

Mr. THOMPSON. Thank you, Mr. Coleman.

I want to thank the panel for their testimony, remind the Members that Committee Rule 3(d) imposes a 5-minute limit on the questions. I think we have votes in about an hour, plus I don’t want to be labeled as a wimp by Chairman Bishop.

[Laughter.]

Mr. THOMPSON. That is my honest motivation here. The Chairman will now recognize Members for questions they may wish to ask the witnesses, and I will start by recognizing myself for 5 minutes.

Ms. Hamsher, thank you for being here. It is great to have a constituent and a fellow Penn Stater with us today.

Ms. HAMSHER. Thank you.

Mr. THOMPSON. Thanks for telling the Committee about your experiences dealing with the BLM and NEPA regulations. It certainly sounds like aggressive NEPA reviews have negatively impacted your ability to do your job. And based on what you have heard, you are not the only one who has had similar experiences.

I would like to go back to the environmental impact statement and the public comments that were filed with the BLM. Could you tell me more about your experiences surrounding these public comments?

Ms. HAMSHER. Yes. Thank you for asking that question. When we had the original environmental assessment put out for public comment, many of the comments came back and extensive lists of questions as far as how close will vehicles be to residential houses on public roads, so I had to hire a team to come out and measure the distance from a public road to residential homes within the forest. It was really quite a challenge, compiling information on a

¹⁹United States State Department, Final Supplemental Environmental Impact Statement (Jan. 2014) at ES-34 & Table ES-6 (estimating that rejecting the pipeline lead to higher greenhouse gas emissions than approving it because all the oil would be transported by rail, which requires “28 to 42 percent” more greenhouse gas emissions than pipeline transport).

²⁰Coleman, *Beyond the Pipeline Wars*, *supra* note 17 at 144–45.

²¹United States Department of State, Record of Decision and National Interest Determination (Nov. 3, 2015) 29 <http://www.energylawprof.com/wp-content/uploads/2016/01/KeystoneXL.Record-of-Decision.pdf> (emphasis added).

²²Arthur W. Murphy, *The National Environmental Policy Act and the Licensing Process: Environmentalist Magna Carta or Agency Coup De Grace?*, 72 Colum. L. Rev. 963, 963 (1972).

pipeline that we have nothing to do with. We do not own the pipeline in that area.

So, it was really challenging to get this information together and get it in to BLM to respond, to allow them to respond to public comment.

Mr. THOMPSON. It sounds like BLM really relied on you to equip them to be able to respond to the public comments.

Ms. HAMSHER. They did. They did.

Mr. THOMPSON. Interesting.

Ms. HAMSHER. And we hired numerous consultants to gather the data that they were looking to get.

Mr. THOMPSON. Can you tell me how many conventional wells are on Federal land in the Wayne National Forest?

Ms. HAMSHER. As I understand it, there are roughly 1,200 producing wells on the Federal surface of the Wayne National Forest, as we speak.

Mr. THOMPSON. So, it is a lot like my national forest that I am privileged to represent, the Allegheny National Forest.

Ms. HAMSHER. Right.

Mr. THOMPSON. It is a national forest, it is an oil-producing area, an energy-producing area.

Ms. HAMSHER. Right.

Mr. THOMPSON. Part of the national forest responsibility is to make sure that we have the resources that we need.

Since your wells would have no additional surface impact, why is BLM saying that they have an issue with your permit, as opposed to the others in the long history of BLM permitting?

Ms. HAMSHER. Right. Initially, we thought that we qualified for a categorical exclusion, due to the fact that it was a sub-surface parcel with no Federal surface impacts.

Their stance, I think, was that we were going to all move forward by including the BLM. But when some of the environmental NGOs came and put a suit against the BLM for leasing the Federal minerals, BLM changed their mind then and wanted to do a full-blown environmental review.

Mr. THOMPSON. The entire purpose of the National Forest System, and we are very proud that was created by a Pennsylvania person, is to actually provide precious resources to the American public. After all, the public owns those forests.

As NEPA continues to be weaponized, which leads to the decrease of responsible resource production, what are the impacts that you have seen on local communities?

Ms. HAMSHER. As you know, we are in that Appalachian Basin. It is quite an economically depressed area. This has been a godsend to the landowners in that area and the communities, the schools receiving tax money, a lot of the economic boom for this area, it has been great.

Certainly, they are in a position to continue to have decreased unemployment rates, they have decreased substantially over the years, there have been a lot of studies done on that over the past couple of years with oil and gas development. So, it has been quite impactful.

Certainly, for this particular area, and where the Wayne National Forest is, it has been really suffering. There was a plant

that recently closed down and a lot of people lost jobs. A lot of the area suffered tax revenues not being delegated to them anymore. So, having oil and gas in this area, our landowners being able to benefit, has been great.

Mr. THOMPSON. Yes. Thank you very much, and I yield back the balance of my time.

Ms. HAMSHER. Thank you.

Mr. THOMPSON. I am pleased to recognize Mr. Lowenthal for 5 minutes of questions.

Dr. LOWENTHAL. Thank you, Mr. Chair. Of all the issues that we cover in this Committee, I continue to think that NEPA may be the most important issue in my congressional district.

Let me tell you about the district. It includes what the locals in my district, or people in my district, used to call—although fortunately not as much anymore, if not any more—what used to be called the diesel death zone, which are the neighborhoods of low-income and minority communities that border the busiest port complex in the Nation.

Historically, these communities have had above-average rates of asthma attacks, cancers, and other health issues that are associated with air pollution. NEPA has been the Federal tool that these communities in my district have used for weighing as major projects have been evaluated and finalized, and it has been very, very helpful to really changing the culture and enabling our ports to have the greatest economic growth and the development of the cleanest ports in the Nation, if not the cleanest ports now in the world. So, we cannot do away with this, one of the central tools for protecting public health.

But my question is that one of the central aspects of the National Environmental Policy Act was the creation of the Council on Environmental Quality, or CEQ. The vision for CEQ is that it would be a central office for helping agencies deal with their commitments under NEPA, and would help protect communities and the environment, while helping the NEPA process move more smoothly and efficiently.

Unfortunately, the current Administration has all but done away with CEQ. It has moved the Council out of its long-term home near the White House, it has reassigned career employees and all but shuttered its operations. As far as I know, there is no nominee for CEQ Director at this time, and there are no members of the Council. This is another way, I believe, that the Trump administration, President Trump, is knowingly shirking its legal responsibility to work toward policies that protect Americans' health and the environment. And I personally find it appalling.

My questions are for Mr. Greczmiel.

Mr. Greczmiel, can you please explain to us the type of activities you undertook when you worked for CEQ, and how CEQ helped the NEPA process go smoothly?

The second part of that question is, is CEQ able to operate without having any members of its Council?

And in your opinion, is having an empty Council legal? The Council on Environmental Quality is mandated by law through the National Environmental Policy Act. Not having any Council, is this legal?

So, those are my questions.

Mr. GRECZMIEL. Thank you. I have retired from the practice of law.

Dr. LOWENTHAL. All right.

Mr. GRECZMIEL. Whether or not it is legal I think misses the point that it is important that it have leadership.

CEQ, for the first time that I am aware of, has been going for a long period of time without someone at the helm who is recognized as leading the effort there.

Dr. LOWENTHAL. Or a Council.

Mr. GRECZMIEL. I might point out that when I retired at the end of 2015, there was one position in CEQ that was full-time, dedicated to NEPA. As you indicate, one of CEQ's key missions is to aid agencies in implementing the statute. Fortunately, after I left, there was a second position created. Two positions overseeing Federal agencies, all 85 of them, and their implementation of NEPA.

I will just briefly touch on some of the initiatives that I was able to work on while I was there. And I think that they are beginning to show some progress, that being there is consensus in all the studies that have taken place, in all the task forces that have been held.

I headed up one, Mr. Pombo headed up one, Ms. McMorris headed up one. They all found that if agencies started their reviews without engaging all of the other Federal agencies, or state or local agencies that had an interest in the matter, that they might likely overlook something. If they overlooked the local populous, they might not know which issues they should look at in depth, and which ones they shouldn't.

So, rather than creating documents that are broad with the kitchen sink approach that we have heard about—and with all due respect, the current median time—not average, but median time—is about 3.7 years for an EIS—agencies have been able to sculpt their analyses more wisely. We have had inter-agency efforts that have focused on how to bring together all of the different interests.

Mr. THOMPSON. I am sorry, the gentleman's time has expired.

I will now recognize Mr. McClintock for 5 minutes of questions.

Mr. MCCLINTOCK. Great, thank you, Mr. Chairman.

Mr. Coleman, first let me get your reaction to the principal point that we have heard from the Minority that there is nothing to see here, no big deal, there are only 200 lawsuits filed every year, that is 1 percent of the total environmental reviews, and categorical exclusions are applied to 95 percent of them. Nothing to see here, folks. Move along.

Mr. COLEMAN. Yes, there is no disagreement on the number, again, 95 percent of projects that would, in theory, require a permit are approved under a categorical exclusion.

I would encourage you to look at what those categorical exclusions are for. Some common things would be if you wanted to build a bike lane, if you wanted to put some signage up on a highway, or if you wanted to do some landscaping on a highway.

I think there is no danger of us falling behind other countries in landscaping on the size of our highways. And then I am glad it

doesn't take 7 years of environmental review to figure out if we should put up a "delays ahead" sign.

Mr. MCCLINTOCK. How about forest managing, thinning a forest to assure that the timber has enough room to grow and resist disease, pestilence, drought, and ultimately catastrophic wildfire?

Mr. COLEMAN. Yes, so each of those projects, if it is on the border, as Mr. Greczmiel said, you are going to have to do an environmental assessment. Those environmental assessments are, in theory, supposed to be substantially shorter than environmental impact statements, which are supposed to be 300 pages, but typically are well over 1,000.

Mr. MCCLINTOCK. We have not been able to get a categorical exclusion for forest thinning.

Mr. COLEMAN. Right.

Mr. MCCLINTOCK. I represent the Sierra Nevada, and the result is we now have four times the timber load that the land can support, and the timber is dying. We have lost well over 1,000 square miles of forest land in my district alone over the past 5 years to catastrophic fire. The pine stock is pretty much completely wiped out at this point because the timber is so over-crowded it can no longer resist the stresses placed on it by drought, pestilence, and disease.

We had a categorical exclusion signed into law, but only for the Tahoe Basin. The Region 5 manager at the Forest Service tells me that that has taken their environmental assessment from 800 pages down to 40. Does that sound about right?

Mr. COLEMAN. Yes, absolutely. Typically, that is going to require a lot—yes, those environmental assessments can easily go 800 pages.

Mr. MCCLINTOCK. What I am hearing in my district is, once a fire has come through and killed off the timber, it still has enormous salvage value, but that value declines fairly rapidly. It now takes a full year under NEPA on a fast track just to do an environmental assessment to remove the dead timber. And by that time it has lost well over half of its value.

If anybody files a lawsuit, they don't have to win it, they just have to file it, it will run out the clock on the remaining auction. The result is timber that we used to be able to harvest and then use the proceeds to replant now just sits there and rots. Meanwhile, brush builds up and a few years later you have 5 to 8 feet of brush. Those big, dead trees that we once were able to remove now topple on that brush and you have a perfect fire stack for a second generation fire.

We have talked about thinning. I have a little district in my congressional district, a town called Forest Hill. They have been trying to get an 18-foot spillway gate added to the dam that provides for their water supply, \$2 million for the spillway gate, this is a town of about 5,000 people. But on top of that, they have to budget at least \$1 million for environmental reviews, \$2 million for environmental mitigations, and then \$6 million is the fee that the Forest Service has handed them to relocate a trail and a handful of campsites.

What is that doing to our ability to provide water for our regions, as well as to maintain the health of our forests?

Mr. COLEMAN. Well, it is certainly a problem, and I think we can all say in the abstract to agencies, be quicker to implement categorical exclusions, et cetera. But the reality is the agencies are constantly faced with the threat of litigation.

Mr. MCCLINTOCK. Well, it used to be we could thin out a forest, sell that excess timber, and the foresters would come and identify the timber, and we would actually generate money for the Treasury that could then be used for other forest management purposes.

Now, they are telling me the environmental assessments cost far more than what we can get back as timber, so a lot of those operations simply no longer take place. Has anybody done a study on the environmental damage caused by NEPA, as calculated by habitats incinerated, acreage destroyed by fire, and the like?

Mr. THOMPSON. The gentleman's time has expired.

Mr. MCCLINTOCK. Can I get a yes or no?

Mr. COLEMAN. We don't have enough studies on that. There are a number of studies we should be doing on NEPA.

Mr. THOMPSON. I am pleased to recognize Mr. Huffman for 5 minutes.

Mr. HUFFMAN. Thank you, Mr. Chairman. And I do want to thank you for inviting a witness to talk about the Point Reyes National Seashore, one of the most amazing, awe-inspiring landscapes anywhere in the country. This is a place where historic dairies and ranches are an integral part of the fabric of this great national park unit, and also the surrounding Marin County agricultural community.

And while I appreciate Dr. Watt's research, it is important to clarify that her testimony, at least in some elements, does not reflect what I believe to be the prevailing view of ranching families in Point Reyes today.

Had the Majority invited a witness from the Point Reyes Ranchers Association, a group that I work with and meet with regularly, you would have heard some of the positive aspects of this unique relationship between the Park Service and the ranchers. It is not a perfect relationship. But in my experience, most ranchers regard the Park Service as a more or less decent landlord, not the capricious, heavy-handed, and anti-agriculture agency that is sometimes portrayed by its critics.

Most ranching families in Point Reyes don't want to fight about the past. They don't want to re-litigate whether Secretary Salazar should have renewed the Drakes Bay Oyster Company lease, and they don't want to be at war with the Park Service. These ranchers are looking ahead, and they are actually working right now, together with the Park Service, as parties to a settlement that I hope will lead to long-term leases to keep our historic ranches and dairies as working landscapes in the Point Reyes National Seashore in perpetuity.

I would like to ask unanimous consent to include in the record two recent letters, just as examples of this, from ranchers in my district making that point in more detail.

Mr. THOMPSON. Without objection.

[The information follows:]

Working with the park

As ranchers in the Point Reyes National Seashore whose lives will be deeply affected by the ongoing general management plan amendment, we feel the need to step out of our comfort zone and make our views on the planning process clear. It is too important of a topic for us to remain silent. We want it to be known that we are in alignment with David Evans and Claire Herminjard's comments they made in a letter to the Light last week.

We understand the value and importance of this planning process, and have positive and mutually respectful relations with National Park Service staff. We expect to work constructively with N.P.S. throughout the current planning process and beyond. We are actively engaged in the G.M.P.A. planning process and believe that through this work we can find solutions to various concerns affecting different stakeholders. Some topics at hand are complex and require the thoughtful approach established by the public planning process before us. The process can build mutual trust and consensus with different stakeholders and increase public confidence in the management of the seashore.

We believe promoting exchanges between environmentalists, ranchers and the N.P.S. will lead to a better understanding of the issues around ranching and the environment in the seashore—resulting in a G.M.P.A. that will help the seashore become a model for productive agriculture on public lands throughout the United States, a long-term benefit for all.

**Bill and Nicolette Niman;
Bob and Ruth McClure;
Dan and Dolores Evans;
Julie Rossotti;
Betty Nunes;
Bob Giacomini;
and Tim, Tom and Mike Kehoe**
Point Reyes National Seashore

A moderate rancher voice

As current ranchers and leaseholders in the Point Reyes National Seashore, we feel the need to express our desire for a peaceful planning process that embraces cooperation with the National Park Service, our local environmental groups and the greater public with the goal of seeing a General Management Plan update that provides for optimal public use of our national park as well as long-term leases for the ranching families who steward these lands. We are proud to be a part of this process and trust our park service to understand not only the cultural and historical significance of ranching in the park, but also how our activities contribute ecological management services and enhanced ecosystems for our varied wildlife.

We also feel the strong need to express our concern over recent activities by the newly formed Resilient Agriculture Group. We understand that these may be well-intentioned citizens and fellow ranchers and we appreciate their support of ranching in the seashore. That said, we are deeply concerned by their methods for expressing their support and believe their contentious actions are wholly counter-productive to completing the management plan update and securing long-term leases for ranchers.

Additionally, it is critical for us to note that often in the media, the Point Reyes ranchers are lumped together as having one viewpoint. This is simply not the case, and a rather narrow scope of reporting. We, among several of our ranching peers, are not supportive of antagonistic tactics, such as those used by RAG, but rather trust in the park service process. We are also highly concerned that the Point Reyes Seashore Ranchers Association tends to have one voice in the media—that of Kevin Lunny. While we respect Mr. Lunny's right to his views, neither he nor the ranchers association speak for all ranchers.

We are here to say that we hope the voice of the moderate rancher rings true through this process and that the park service, the general public and our community does not let the cry of conflict be the only echo in the chamber. To emphasize, we, as a ranching family on Point Reyes, support the park in their efforts to complete a fair and comprehensive general management plan update and look forward to proactively participating in any way we can in that due process.

David Evans and Claire Herminjard
Point Reyes National Seashore

Mr. HUFFMAN. Thank you, Mr. Chairman.

Now, Dr. Watt, I appreciate that you started off your testimony with the caveat that you don't want to be associated with weakening environmental laws, and you have probably figured out from the title of this hearing, from the Chairman's opening comments, and some of the other discussion that that is really what this is all about. So, I was glad to hear your comment, that you don't support that general agenda. But I want to clarify a little more specifically, because this Committee does not just attack NEPA generally, it actually does some very specific things.

For example, you don't support waiving or weakening NEPA reviews of timber harvesting or oil and gas drilling, as the Majority has repeatedly proposed, do you?

Dr. WATT. No, I do not.

Mr. HUFFMAN. This Committee has approved legislation to basically take carbon pollution and climate change off the table in NEPA analyses. You don't support that, do you?

Dr. WATT. Definitely not.

Mr. HUFFMAN. I appreciate that. Moving on, Dr. Watt, I do disagree with some of your testimony, such as your criticism of the consistency of the NEPA analysis by the Park Service, suggesting that it is driven by, basically, simply whether they like a project.

I think that is an over-simplification, and I think it fails to recognize that the level of NEPA review depends on all sorts of different requirements in different circumstances. The significance of environmental impacts vary from one situation to another. And in some cases, there is caselaw that requires that, even though a use might be continuing, a NEPA process is required. I am thinking, for example, of long-term water contract renewals. You are continuing the same practice, but you have to do a full NEPA analysis. And that is just well-established law.

So, I don't think it is as simple as just the whims of an agency and whether or not they like a project. I think there are all sorts of constraints that dictate this.

I do agree that we need to protect and preserve the historic ranches and dairies on the seashore, and I agree that the Park Service has shortcomings in their management of the tule elk, a very successful reintroduction of the tule elk, but it has created real challenges for some ranches and dairies, and this has to be addressed sooner, rather than later. Senator Feinstein and I are working on this, and pushing the Park Service, and we are going to continue to do that.

I also agree that in a perfect world the enabling act of the seashore would be a little more direct about the preservation of the historic ranches and dairies, but I do want to clarify one thing in the limited time I have left.

You suggested that, as a result of amendments to the enabling act, the statute no longer pays specific attention to agricultural lands. But isn't it true that there continue to be references to agricultural properties elsewhere in the legislation? I just want to clarify. You are not suggesting that Congress has somehow said they no longer want agriculture?

Dr. WATT. No, not at all.

Mr. HUFFMAN. Thank you for that clarification. I also note that there are actually more acres grazed today than during the 1980 general management plan. So, at least if you look at that time frame—my information is 28,000 acres versus 24,000, as well as report language Senator Feinstein and I have gotten into previous appropriation bills, all suggesting that there is neither congressional intent or Park Service intent to do away with these ranches.

Mr. THOMPSON. The gentleman's time has expired. I am now pleased to recognize the gentleman from Colorado, Mr. Tipton, for 5 minutes.

Mr. TIPTON. Thank you, Mr. Chairman, and I thank the panel for taking the time to be able to be here.

Dr. Watt, maybe just as a little bit of a followup to my colleague's questions, in your research of historic working landscapes at Point Reyes National Seashore, what is the impact and influence of litigation on the NEPA review process and on decision making by the Interior and National Park Service officials?

Dr. WATT. Recent litigation has, as Representative Huffman just mentioned, resulted in a new settlement agreement that—and this is unusual, in my experience of working with NEPA—has set out three alternatives that must be included in the new general management plan update and NEPA process that they are working on. So, that is a direct outcome of that litigation.

Mr. TIPTON. How does that really impact? I understand the policy end of it. What kind of impact is that going to have on a project?

Dr. WATT. Well, all three of the required alternatives are either reducing or eliminating ranching. So, to me, that is setting up where the range of reasonable alternatives are. If not for that lawsuit, I don't believe that there would be so many alternatives considering reducing and/or eliminating ranching. So, it is having a direct outcome on what is being analyzed and how much is being analyzed.

Mr. TIPTON. So, it is not a matter of being able to preserve ranching in perpetuity, as much as reducing and, in some cases, eliminating?

Dr. WATT. That is what the lawsuit has resulted in, three guaranteed alternatives that will analyze those possibilities.

Mr. TIPTON. Good. I appreciate that. I just wanted to be able to get some clarity.

Dr. WATT. Sure.

Mr. TIPTON. And we would like to be able to also deal with some issues when we are looking at the title of the hearing. As a point of clarification, I think there isn't a person in this room that does not want clean air, clean water. But it is also about what is the real mission of NEPA. Is it to be able to establish policies, what is impacting it?

I will give you an example that is currently in my district. We have one company right now that is in its 9th year. Not 3.7, as the average, but 9th year of going through NEPA. As soon as they are about to finish and think they see the light at the end of the tunnel to be able to move forward with a project, another lawsuit is filed, extending it out further.

The cost ultimately to the consumers—and they want to be able to do that the right way. I think that is very important to be able to underscore this. It is a company that wants to make sure that they are dealing with the environment respectfully, but also creating jobs that are going to be necessary in our district.

And I think, Mr. Coleman, maybe you could answer this for me. I would like to be able to get your thoughts today on what you are seeing, in terms of NEPA as a policy tool and some of the delays that are created. How do we get back on track with the original intent of NEPA, to be able to do what I think, as Americans, we all embrace: clean water, clean air?

Mr. COLEMAN. Absolutely, environmental review is appropriate. And I think Mr. Greczmiel's written testimony had a bunch of examples of good situations where NEPA led to an improvement in what the agency's ultimate decision was, so there is no question.

The question is should it take over 5 years to do that, on average, if we use the normal arithmetic average, like we would, which, by the way, is what a company thinks about when it is thinking about whether it wants to invest in a project. It wants to know how long does the average review take.

So, I think, the question there, I think we could look to the experience of other countries. No other country has environmental reviews that average over 5 years. But if you look at Canada, Prime Minister Trudeau has recently proposed expanding the topics that are covered by their environmental reviews, but completing all of them in 300 days. That is a sixth of the time of the average review in the United States.

So, I think it is very possible to set some time limits for NEPA reviews that allow us to carefully consider the environmental consequences of a Federal approval, but don't do so much to harm the United States' position for investors that are thinking about investing in major infrastructure projects here.

Mr. TIPTON. Great. Ms. Watt, would you have any comment on that?

Dr. WATT. No, sorry.

Mr. TIPTON. OK. I do appreciate your comments. I think we need to be trying to move to a win-win, rather than a win-lose scenario.

And some of the challenges that we have I think certainly need to be addressed, looking at some of the frivolous lawsuits that are put into place, and achieving the ultimate goal, but still allowing American business to be able to thrive and to be able to grow.

Thank you, Mr. Chairman, and yield back.

Mr. THOMPSON. The gentleman yields back. I am now pleased to recognize Mr. Sablan for 5 minutes of questioning.

Mr. SABLAN. Thank you very much, Mr. Chairman. I very well understand the power of the National Environmental Policy Act. In my district, the Northern Mariana Islands, our military proposes an expansion of activity on the island of Tinian, and probably on Pagan, where previously the military had little or no presence. If not for NEPA, the military might never have had to explain their plans to the public or estimate what the cost would be to our environment and way of life.

And if not for NEPA, the public would have little or no opportunity to comment, criticize, or question the military's plans. The

people I represent are likely to argue that NEPA should be even slower to allow more time for objective technical and scientific study. A lawsuit with local organizations as plaintiffs is now pending in the courts. NEPA empowers ordinary Americans like my constituents.

And because I don't have too much time, I am going to ask each one of you for just a yes-or-no answer. If NEPA had existed in the 1950s, do you think that the U.S. Government would have conducted the atomic and hydrogen bombs on Bikini Atoll and Micronesia?

Dr. Watts, yes or no?

Dr. WATT. No.

Mr. SABLON. Ms. Hamsher?

Ms. HAMSHER. No.

Mr. SABLON. Mr. Greczmiel?

Mr. GRECZMIEL. Most likely, no.

Mr. SABLON. And counselor?

Mr. COLEMAN. I am sorry. I should say I have no idea.

Mr. SABLON. Yes. No idea?

Mr. COLEMAN. No idea.

Mr. SABLON. Atomic and hydrogen, over 50 that were tested and—

Mr. COLEMAN. I think a lot would depend on if there were the kinds of exclusions that existed—

Mr. SABLON. Would you like that in your backyard, sir?

Mr. COLEMAN. Absolutely not.

Mr. SABLON. That is exactly why they did it there.

Mr. Greczmiel, are there examples of Federal actions—I just made one again—or projects implemented before NEPA's enactment in 1970 in which an impacted community's inability to participate in the decision-making process had adverse effects on them?

Mr. GRECZMIEL. Yes. There are several examples. For example, I-94 in Minnesota, there were airport expansions that took place that impeded not only wetlands, but destroyed buffer areas between airports and communities. So, yes, there are a lot of examples there.

And I might just point out as a point of clarification that there are outlier examples on both sides. For example, the proposed military relocation to Guam, which also impacted how Tinian and Pagan were being looked at, was one where the NEPA process did provide a lot of benefit to the local communities, in terms of shaping the military's relocation without impeding national security or preventing the Department of the Navy from pursuing its mission.

Mr. SABLON. Thank you. Again, in your opinion, is the system of litigation as part of NEPA widely abused to block or prevent projects or government action?

Mr. GRECZMIEL. I am sorry, say again.

Mr. SABLON. In your opinion, is the system of litigation as part of NEPA widely abused to block or prevent projects or government action?

Mr. GRECZMIEL. I don't believe that it is widely abused. I think that, as I mentioned earlier, it is a topic of last resort for communities that are going to be impacted.

Mr. SABLAN. Right. And say that an island is going to be used for amphibious landing live bomb training. That would be a NEPA, or an environmental impact study, it would be——

Mr. GRECZMIEL. It would be subject to an environmental impact statement, most——

Mr. SABLAN. Right, and it is in the citizens' rights to demand their government to make a full study, full explanation of what damage, because that island will not be—it would be like one of the Hawaiian islands, and——

Mr. GRECZMIEL. The environmental——

Mr. SABLAN. And maybe the counselor should read up on Bikini and the result of that, where children were born deformed. You certainly don't want to look at it in a picture, let alone in life. I come from that region, sir. Shame on us.

Mr. Coleman, I don't have much time. I will submit my statements for the record, Mr. Chairman. Thank you.

Mr. THOMPSON. The gentleman yields back. I now recognize the gentleman from California, Mr. LaMalfa, for 5 minutes.

Mr. LAMALFA. Thank you, Mr. Chairman. Thank you, panelists, for coming here.

Of course, NEPA has been a source for a lot of frustration for anybody trying to do a project, especially in my home state of California. We have our own CEQA, as well. It seems very, very simple projects that are a lot of times adding to already-existing infrastructure are delayed, in my view, unnecessarily, because, oh, we have to do a NEPA. For what?

What are we going to learn from this NEPA, when you are adding a lane to a highway, or repaving, or things of this nature that are really pretty simple? But we can say, oh, just might as well add 2 years to the time and cost of a simple project.

In my district, grazing is a very key element of ranching life. But also, with fuels management in areas. And I think in the state of California, somebody came up with a shazam idea of studying how grazing can be an effective tool—I just read this the other day where they think that grazing could be a good fuel management on grasslands, et cetera.

I am glad in the year 2018 that they are realizing this. But in an area of my district here we have grazing permits that would be offered by the Forest Service—have been, again, declining for a long time, forest management being a problem, and the NEPA process being a big, big delay of that, too.

The grazing allotments within six national forests I have in my district are pushed back farther and farther on the burner, and the costs keep going up because of NEPA. Currently, there are 14 vacancies in just the one Shasta Trinity National Forest because the NEPA process has not been completed, they are still vacant.

The Plumas National Forest—again, these are both Northern California—22 vacancies of grazing permits not fulfilled. So, Mr. Coleman, what reasonable measures could you think we can do to, again, alleviate the fear that ranchers, grazers, et cetera, are ever going to have a chance to use public lands for grazing with this type of attitude, with this type of delay going on?

Because they don't seem to feel like there is a lot of hope to continue what has been a good practice in the past, where it has

actually shown that grazing has been a good tool, not just for fuels management, but also in the pawing of the ground, the moving around, it actually has helped. What assurance or what ideas—please, go ahead.

Mr. COLEMAN. Yes. I think, so far, we have had bipartisan majorities, presidents of both parties, and they have focused on the agencies, trying to urge agencies to move faster with this, to use more streamlining, et cetera.

And I think, whatever one's criticisms are of current funding, funding has gone through all sorts of cycles for those agencies, but the one constant is that no matter what the funding, no matter how much we have asked agencies to streamline, the reviews continue to get longer, and delays continue to increase.

Mr. LAMALFA. So, when you drill down on it, why are they getting longer? What additional information or what additional process has made it jump from 2 to 3 to now over 5 or 6 years?

Mr. COLEMAN. Well, the more you dive into it, I wouldn't say that the review turns up completely useless information.

The reality is you have a very good idea of what the environmental consequences are going to be after a year. But if you spend another 6 years studying it, do you learn some more things? Absolutely. There are just diminishing returns to each of those years. And I think if you looked at the environmental impact statement, you would be impressed with all the science, et cetera, that went into it.

There are obviously benefits to environmental review, but the question is whether we are appropriately balancing those. And I think if Congress wants to do something about it, it is not going to make any—I mean you are going to have limited traction trying to ask the agencies to go further without doing something about the judicial review that is driving a lot of this agency gold-plating of the analysis.

Mr. LAMALFA. So, the delay is obvious, what it causes to people doing projects. They are just giving up on them. What is a timeline that you think would be reasonable to actually learn that? And then using past precedent, it is like, when you do grazing, you kind of know what the concept is. When you are doing forest thinning or salvage after a fire, we kind of know what the idea is.

So, how much can we compact it using past knowledge? Quickly.

Mr. THOMPSON. The gentleman's time has expired.

Mr. LAMALFA. Can we get a quick answer?

Mr. THOMPSON. Real quick.

Mr. COLEMAN. I think you could probably do it in 300 days. I wouldn't cut off judicial review that quickly.

Mr. LAMALFA. Thank you.

Mr. THOMPSON. I am pleased to recognize the gentleman from Virginia, Mr. Beyer, for 5 minutes.

Mr. BEYER. Mr. Chairman, thank you very much. And thank you all very much. Fascinating hearing, and I confess it is really interesting to try to reconcile the two different narratives we hear.

On the one hand, a number of examples about how incredibly long it takes, the 6 years, the whole notion of the courts essentially being so rigorous that the environmental review is going to take ever longer to have the documentation pass muster on the court.

And on the other hand, Mr. Greczmiel's statistics that still show that out of 25,000 or whatever, you are getting less than 100, 4 percent EISs and maybe 100 of those being—so trying to reconcile those narratives is difficult. And it may be that the vast majority fly right through, and the handful that don't are attracting an awful lot of attention in a weaponization hearing.

Dr. Watt, specifically, you had said that the inconsistencies in NEPA and the land management process, the inconsistent application of NEPA, and you pointed out a number of examples: the failure to update the general management plan; the failure to manage or control the tule elk population; pushing permittees to discontinue ranching. All of that seems to come back to what is the culture around NEPA in a given agency.

Do you have an excellence in management and execution which would minimize it? How do you address that? How do you preserve all the good parts about NEPA in terms of the execution, and avoid the 6-year parts?

Dr. WATT. I do think that there should be better training of agency staff, and better funding for agency staff to work on environmental review. We have heard a number of examples of agencies being cut back and even the CEQ itself being cut back, so I think that is an important piece.

Another piece that is very important for a lot of these kinds of documents is to be collaborative in the process, to make sure that agencies are reaching out to other relevant agencies, but especially the affected community that is nearby. I think the more that this can be a collaborative process, it helps avoid lawsuits by bringing more participants on board, and participating in the process, and also, I think, makes for writing a plan that is more readable and understandable by the public.

All too often these are documents that are highly, highly technical, and are almost impossible to read, especially when they are very long. One of the things that was noted in the one NEPA project that I won a national award for was how readable the document was and how useful for the local community.

Mr. BEYER. A simple question to Mr. Greczmiel. Ms. Hamsher talked about her project was a mile underground, the tunnel going down, shaft going down, was on private land on an existing private platform with horizontal drilling to access the minerals.

What is the rationale for not having a categorical exclusion on that, for invoking NEPA on Federal lands?

Mr. GRECZMIEL. First of all, there are categorical exclusions for APDs. I might want to point out that those are established in each of the agency's own regulations, so they are different from agency to agency. Not every agency deals with forest management or with APDs.

So, there are some, and the question would be—if I were sitting at CEQ and she were to come to see me, I would want to say, "Who have we talked to at BLM and Interior to find out why they have determined the need to elevate this from a categorical exclusion to an EA?"

On the other hand, 2 months to prepare an environmental assessment, as was the case, is not that bad. It is actually very good. The question I would then raise is why is it that, after the

close of the comment period at the end of November, we haven't heard anything since then?

Again, NEPA is fact-specific and case-specific, and it is very difficult to parse through why in one case an APD is not, and in another case it is.

Mr. BEYER. Let me ask you another question. Mr. Coleman has suggested that it really takes, the company is forced to wait an unreasonable length of time for a permit, that permit should eventually be immunized from invalidation under NEPA, not be able to sue on. He says if they have already studied it for 6 years, why do they need to sue in the years after that? How would you answer that?

Mr. GRECZMIEL. One of the things that I would say is that, in my experience, rarely is NEPA the only basis for the lawsuit that is brought. Typically, it is joined with Clean Air Act, Endangered Species Act, or Clean Water Act issues. So, even if you were to do away with NEPA, we still have these other substantive laws that, thank goodness, we have to comply with. What NEPA does is bring them all together.

We can have examples—with all due respect, there are outliers on both sides. I can give you outliers of an EIS that was done for an entire national forest in a year.

Mr. BEYER. Great.

Mr. THOMPSON. The gentleman's time has expired.

Mr. BEYER. Thank you very much, Mr. Chair. I yield back.

Mr. THOMPSON. Thank you.

Mr. Westerman, you are recognized for 5 minutes.

Mr. WESTERMAN. Thank you, Mr. Chairman. Thank you to the witnesses for being here today. In Chairman Bishop's opening statement, he talked about EISs, the average time now is around 5 years. But I know on Forest Service projects the average is 5.1 years for an EIS.

Mr. Greczmiel—I hope I said that close enough—you mentioned that NEPA was like the environmental Magna Carta for the United States. And I agree there have been very good things that have happened to our environment from NEPA, with the Clean Air and the Clean Water Act.

I kind of have two hats from the private sector. I am an engineer and I am also a forester. From the engineering standpoint, I know how permitting for air discharge and water discharge, there have been great improvements on decreasing particulates and hazardous pollutants, both in the air and in the water, and that probably wouldn't have taken place without something like the Clean Air or the Clean Water Act.

But now I want to put on the forestry hat for a minute. We all know that healthy forests are good for everyone, because of the photosynthesis. They clean the air, they take carbon dioxide out of the air, create food, store the carbon in the tree, and release oxygen. Trees are natural water purifiers. Healthy forests provide wildlife habitat. From an endangered species standpoint, healthy forests are good for that. We love to recreate on our forests. There is really no downside whatsoever to having a healthy forest.

So, I want to look at the relationship between NEPA and healthy forests. And we are seeing on our Federal lands that fall under

NEPA, there is no question that there are many unhealthy forests. The Forest Service says that 80 million of our 192 million acres are subject to catastrophic wildfires, whereas you look at private land or state-managed land or tribal-managed land, and we have these healthy forests that are not seeing near the destruction that we are seeing on Federal lands.

Today, we were at the Joint Session of Congress with the French President. He made a lot of statements. Some he got standing ovations for, some people chose to sit. But he talked a lot about the environment. And one of his statements was, "We must find a smoother transition to a lower-carbon economy." And many of my friends across the aisle clapped, many of us on my side of the aisle clapped.

He also mentioned that we should use science. And Mr. Chairman, for the record, I want to submit this paper that was written by Chad Oliver from Yale. It is called "Carbon, Fossil Fuel, and Biodiversity Mitigation with Wood and Forests," and they talk about the best way to mitigate carbon is to manage our forests, healthy, to use more wood products.

So, when I look at this cumbersome process of NEPA that is preventing us from managing our forests, I wonder, is it really the best tool to be used?

And I want to just go down the table and ask. Do you believe that the current NEPA process promotes or hinders healthy forests? And should we be looking for a different model for forestry?

Dr. WATT. I actually believe that it does help healthy forests by looking at all of the various possible environmental impacts. And, often, as new science comes along—like the paper that you cited incorporates that into our understanding of environmental review.

Mr. WESTERMAN. So, you think regulating so you can't manage the forest actually makes the forest healthier?

Dr. WATT. I believe regulating in the sense of looking at and considering the environmental impacts and using all the best current science on that.

Mr. WESTERMAN. I would agree with that. Let's move on down the table.

Ms. HAMSHER. I am not a forester, but I am an engineer. In practice, in environmental engineering, certainly we would want to manage the forest appropriately. It has been perceived as unhealthy not to. But at the same time, I believe that there need to be environmental reviews and erosion and sediment control.

Mr. WESTERMAN. Let's move on.

Mr. GRECZMIEL. I can point to several cases where environmental assessments done in a couple of months were used for hazardous fuel reduction projects throughout the United States, including in California and Texas. I can point to environmental impact statements done in less than a year, where healthy forest issues were taken—

Mr. THOMPSON. The gentleman's time has expired.

Mr. WESTERMAN. Thank you, Mr. Chairman.

Mr. THOMPSON. The Chairman now recognizes the gentleman from Florida, Mr. Soto, for 5 minutes.

Mr. SOTO. Thank you, Mr. Chairman. And we almost had a purely freshman-chaired hearing for a moment, with Congressman Bergman and I.

I assumed by the title, "The Weaponization of the National Environmental Policy Act and the Implications of Environmental Lawfare," that it is just hyperbole for let's have a wonderful bipartisan rational hearing on potential NEPA reform. And I look forward to having that.

First, to Mr. Greczmiel, can you give me a breakdown of what this fraction of 1 percent of the cases that are highly litigated with these reviews are? What type of cases are we talking about?

Mr. GRECZMIEL. The cases that are typically litigated involve either environmental impact statements or environmental assessments, where there are mitigated findings of no significant impact, meaning that mitigation is being applied to reduce the level of effect, so that an EIS would not be required. So, they are the cases that deal with significant environmental issues.

Mr. SOTO. Are they mostly oil and gas, or timber, or grazing? What is generally the most contentious use of resources that gets these challenges?

Mr. GRECZMIEL. Those that you have mentioned plus water resource projects from the Corps of Engineers and Highways have always fluctuated over the years. But those have been the four that have had quite a bit of litigation.

I might point out that the Forest Service, in its most recent year, had 3 percent of its cases challenged.

Mr. SOTO. So, with our economy increasing from the 1970s from \$5 trillion to \$17 trillion, have we seen funding keep pace over time, back when you were the Director of NEPA Oversight?

Mr. GRECZMIEL. Funding with regards to the NEPA program, sir?

Mr. SOTO. Yes.

Mr. GRECZMIEL. I would say that, over time, in my opinion, that has diminished. And the interest in maintaining those programs viably has diminished. When we have—

Mr. SOTO. So, when you have less funding and you have less people, then you would have longer reviews. Is that fair to say?

Mr. GRECZMIEL. I would say that to be working as a NEPA professional in the Federal Government you are extremely dedicated.

Mr. SOTO. And has technology changed over time? Do we have more ways to analyze these things? Is that also part of, probably, the lengthiness of these things?

Mr. GRECZMIEL. I would say yes, the technology has definitely raised more issues to the attention of more people over time, and that is a factor that has to be taken into account.

The agencies need to use the new advances in technology—

Mr. SOTO. What do you think is a historically appropriate average review timeline? Looking over time, what do you think would be an appropriate review?

Mr. GRECZMIEL. An appropriate review?

Mr. SOTO. On average.

Mr. GRECZMIEL. On average, over time, for an environmental impact statement? If it is truly a huge one, like, for example, a military relocation to the Island of Guam would be 2, 3 years.

Mr. SOTO. OK.

Mr. GRECZMIEL. An environmental assessment is less than a year or 18 months, depending upon the facts and circumstances.

Mr. SOTO. And do you think there should be any changes to the categorical exclusions, any additions, anything we can make more clear?

Mr. GRECZMIEL. I can attest to the fact that while I was at CEQ, the majority of work that the agencies did in revising their NEPA implementing procedures was to establish new categorical exclusions.

Mr. SOTO. OK. Mr. Coleman, do you think citizens should continue to be able to file these suits?

Mr. COLEMAN. Yes, absolutely.

Mr. SOTO. You brought up an intriguing proposal with a certain time period to file, which seems fairly reasonable. What if there was a plan change, though? Under your proposal, would there be a time to refile, if the plan changed?

Mr. COLEMAN. Yes. Undoubtedly, I think you would have to have some kind of requirement that if the company that is planning it changes its plans, potentially that restarts the clock.

Mr. SOTO. And how long do you think it would take for the public to digest a new project so that we would have an appropriate time period?

Mr. COLEMAN. Again, I think it may seem like everything should end by 6 years, anyway. But I think it was—

Mr. SOTO. I am just talking about the filing period.

Mr. COLEMAN. Oh, the filing? From the completion of the environmental impact statement, I think you should be able to file a challenge within 60 days. And most groups do.

Mr. SOTO. And with the D.C. Circuit, I think that is something that I was a little more concerned about. Wouldn't it be a chilling effect, because a lot of plaintiffs would have to travel across the country to DC to challenge these, rather than in their own backyard, in the backyard of that project. You think it could result in folks not filing simply because it is too inconvenient?

Mr. COLEMAN. I don't think so. I don't think that is what we found with regulation under the Clean Air Act, et cetera, where those also have to be challenged. If you are a small business, you have to come to DC to challenge that.

Mr. SOTO. We heard a little bit from Mr. Greczmiel about categorical exclusions. What specifically would you add in, and what would you make more efficient?

Mr. COLEMAN. I'm not sure. I think the puzzle for investment is about these really big projects, like solar farms is a big area, or transmission. And I do think it is appropriate that they have a full environmental review.

So, I am not favoring, there may be specific examples, but I think the big issue is about speeding up the environmental impact statements for those big projects.

Mr. THOMPSON. The gentleman's time has expired. Now I am pleased to recognize Mr. Hice for 5 minutes.

Dr. HICE. Thank you, Mr. Chairman.

Mr. Coleman, the Government Accountability Office had a report in 2014 in which they stated that a single NEPA lawsuit can affect

numerous Federal decisions and have a far-reaching impact. I think that, in itself, is pretty obvious. But what is also obvious is not only the Federal impact, but the projects themselves, how many different projects are impacted by that type of thing.

Have you, or do you know of someone or some group that has evaluated the economic impact of these projects sitting at the starting gate for a decade, or however long it may take?

Mr. COLEMAN. No, I haven't. I think that kind of study would be very good. We have very few studies on either the economic costs or the economic benefits of the NEPA review process.

Dr. HICE. So, would you say it would be beneficial, would you believe that prudence maybe in the permitting or licensing process, that there be some sort of economic study? I mean, we are already doing the environmental study, why not an economic study, particularly in light of—I mean during the project itself, after the project, and during the delay, what kind of impact is this having, economically?

Mr. COLEMAN. I would favor doing a kind of overall review of the economic impact. I would not favor including that in individual permits, because I feel like adding another thing that everybody has to consider might just slow that permitting process down.

Dr. HICE. Slow it down even more.

Mr. COLEMAN. Yes.

Dr. HICE. But the information would be pretty valuable, because, obviously, we are talking enormous impact that comes about. So, I mean that was just kind of off the cuff, a curious statement if that would be beneficial to know.

Mr. COLEMAN. Well, let me tell you the way I think about it. If you are a very patient company, you might be willing to have a project that pays off after 10, 20 years. Most companies will want the project to pay off sooner than that. But if you are very patient, you might say, "I can have this pay off over 20 years." Well, if it takes you 6 years to get the permit, and then you might be caught up in litigation, the litigation goes 3 to 10 years beyond, that is half of your window for earning back.

So, I think the impact on investors is very important, and I think that for investors, they would be reassured if they knew at some point there is light at the end of the tunnel. Maybe these reviews are going to continue being sort of long, but after 6 years it could cut off.

Dr. HICE. Yes. And even 6 years, to me, seems like an awfully long time. The negative impact of that, from the project itself, let alone potential investors or whatever. You mentioned Canada a while ago, they are trying to get 300 days. And we also have Australia, Germany, some of these others that are 2 years or less.

Mr. COLEMAN. Right.

Dr. HICE. What are they doing right that we are not doing?

Mr. COLEMAN. I think if you read those environmental impact statements, you would be impressed, like with ours, that they cover a variety of topics. I think the major difference that you see with the United States environmental impact statements is they do go into more depth on every topic that they cover.

So, again, I think that is just where there are diminishing returns. We know most of the environmental impacts of a project

pretty quickly, within a year of study, and it is after we are studying every last question, and these are great scientists working on it, good people working on it, but I question whether the benefits of that outweighs the cost.

Dr. HICE. Would you agree that Australia and Canada are two top competitors for liquid natural gas?

Mr. COLEMAN. Oh, yes. Undoubtedly, Canada is not quite there yet, but Australia is. And certainly in resources in general, those are two big competitors.

Dr. HICE. OK. Yet, both of these countries routinely are completing the infrastructure projects in roughly 2 years?

Mr. COLEMAN. Yes. Well, I have to say opposition to oil pipelines is now increasingly a global phenomenon. In some ways a lot of it started here, but it spread to Canada. And we could talk a lot about what Canada is going through right now, if we wanted to.

Dr. HICE. So, I am assuming, then, that you would agree that the infrastructure project delays that we have here when it comes to LNG is a negative thing?

Mr. COLEMAN. Yes, it is a negative, although I would say that the United States is doing pretty well in its LNG exports, again, compared to Canada.

Dr. HICE. OK. Let me conclude. I see I only have about 30 seconds. You are the only one that did not get to answer Mr. Westerman's question about is there a different or better system than NEPA for healthy forests.

Mr. COLEMAN. If the question is, could it be improved, I think undoubtedly the project could be improved to do more to encourage healthy forests and the environmental benefits that that could provide.

Dr. HICE. OK, thank you. With that, I will yield back, Mr. Chairman.

Mr. THOMPSON. The gentleman yields back. I am pleased to recognize Ms. Barragán for 5 minutes.

Ms. BARRAGÁN. Thank you, Mr. Chairman.

Mr. Greczmiel, we hear a lot of complaints about NEPA, horror stories about the Act holding up economic development. Would you say that it is generally not true that these are really happening in less than 1 percent of the instances, where NEPA causes delays?

Mr. GRECZMIEL. I would say that that is true. For example, there was a recent study the Treasury did on 40 projects that were critical to economic development, and it found that in 39 of those it was a question of funding the projects, rather than any environmental review that was at issue.

Ms. BARRAGÁN. So, it sounds like Congress has to continue to fund.

Expediting reviews under NEPA, as some of my colleagues here would have us do, I believe does not address the underlying problem. Telling an agency to do something faster without giving them additional funding is not going to help them do that thing faster.

Instead, we should be focusing today—and this is what I want to do—focus on some success stories that NEPA has provided us with, including highlighting the Act's role as an important environmental justice tool.

One of those success stories is from Los Angeles. I represent the Los Angeles area. The Los Angeles County Metropolitan Transportation Authority's Crenshaw LAX Transit Corridor Project was one of the Federal Transit Administration's first pilot projects piloting a new NEPA process that helped identify and mitigate project risks more efficiently.

Through the project review process, the Transportation Authority determined that a 5-mile stretch of the project could utilize a rarely used existing freight rail line corridor, instead of building new tracks in that section. The railroad agreed to abandoning the line and allowing the Authority to use it. That decision decreased project costs, it saved time, it reduced disturbances for the nearby community by using an existing right-of-way, while providing significant environmental benefits, economic development, and employment opportunities throughout Los Angeles County.

Mr. Greczmiel, low-income and minority communities are disproportionately exposed to pollution and toxins at schools, on the job, and in their homes. I happen to represent one of those majority/minority districts, where you have about 86 percent of the population is a minority, and it is actually one of the more heavily polluted districts in the country. My question to you is how does the NEPA process help protect these types of communities?

Mr. GRECZMIEL. NEPA provides the opportunity for those communities to actively comment and engage in the NEPA process by pointing out the fact that there are impacts that are disproportionate to them, something that is often overlooked or not recognized. It gives them the opportunity to sculpt or help sculpt other alternatives that might not have as much impact on their communities.

There are countless examples, both in the environmental justice arena with toxins, as well as enforced management, and in other areas where, when agencies talk to the local people, as well as the local agencies, they are able to come up with alternatives that have less of an impact on the environment and don't segregate communities, don't cut them in half, and don't put them next to facilities that are harmful.

Ms. BARRAGÁN. Thank you. In 2008, over 120 million people lived in counties that exceeded national air quality standards. I believe NEPA is a critical tool to ensure that the voices of these communities, ones like the ones I represent in Wilmington and Compton, are heard.

If we didn't have NEPA, and let's say a corporation tried to put a coal-fired power plant next to a school, how would local communities be able to share their concerns with the decision makers?

Mr. GRECZMIEL. They would be hard pressed, unless they were able to mobilize and somehow get the attention, through the political process, of those individuals who were leading the agencies.

Ms. BARRAGÁN. Right. Well, that is already a challenge in my district, where people are living below the poverty line, they are working two jobs, and trying to navigate the system. This can be challenging.

Mr. Greczmiel, my last question is, in your experience, when NEPA is implemented correctly, does the law lead to delays of

projects without serious adverse environmental and community impacts?

Mr. GRECZMIEL. It does not. And there is a recent study that deals with oil and gas in the West written by a professor from the University of Utah and another colleague, who found that, because of NEPA, the typical advances that would have been made in designing a project based on the Clean Air Act or the Clean Water Act are actually enhanced and improved even further because of the NEPA process and the inputs that are received from local communities.

Ms. BARRAGÁN. Great, thank you. I yield back.

Mr. THOMPSON. The gentlelady yields back. I am now pleased to recognize Mr. Johnson for 5 minutes.

Mr. JOHNSON. Thank you, Mr. Chairman, and thank you all for being here.

One of the impacts litigation has on NEPA reviews is that Federal agencies will attempt to bulletproof their environmental reviews in anticipation of the potential legal challenges, and we discussed that, and you all know.

Mr. Coleman, can you briefly explain this concept for us, and what the on-the-ground impacts are for project proponents who are undergoing NEPA review?

Mr. COLEMAN. I think the main effect is that it simply takes longer to do these reviews. And every time a new decision comes out that strikes down a NEPA review, you have agencies scrambling to meet a new standard. And those standards just pile up over time with each case, where an environmental impact statement is struck down and requires longer and longer reviews.

Mr. JOHNSON. Dr. Watt, would you take a swipe at that? Tell us what the on-the-ground NEPA experiences are like for ranchers at Point Reyes with regard to this bulletproofing concept.

Dr. WATT. I think it creates more uncertainty for permittees, in terms of the long time frames that they are dealing with. In the case of Point Reyes, they started a general management plan update with the associated NEPA review back in 1997, and over 20 years later, they still haven't produced the actual plan. So, that kind of delay, that is not specific to litigation, but I believe there is probably stretching out, constant rechecking, and going back through, and revising, and then never actually even getting the plan completed.

Mr. JOHNSON. Thank you.

Ms. Hamsher, how about you? Have you seen this bulletproofing in any Federal environmental reviews Eclipse has been involved in? And what has been the impact on your company and its projects?

Ms. HAMSHER. There is a misconception that we are against environmental reviews. We are certainly not against environmental reviews. It is the weaponization of the NEPA itself that actually changes BLM's mind on what they want to do, at what time.

So, that is what we have seen. Certainly, I don't want anyone to think that we are comparing a 10-acre well site that is the max of the surface impact to the Bikini Atoll. It is a totally different thing, so it has been very impactful.

When the BLM gets sued, they slam on the brakes and change their mind, and that is what has been happening. We have had robust environmental reviews as we have been going along, and we did that thinking that we were having the categorical exclusion.

The states have requirements that are quite robust, and we have met all those. And then, when we are applying for the Federal side, BLM gets sued and basically stops progress. So, I don't think anybody here is against environmental reviews. It is just the process of what has been happening to us.

Mr. JOHNSON. And this bulletproofing—I mean for either of you, I see you nodding your head vigorously—does all of this improve the quality of the review in any way, or does it merely serve as building a thicker and thicker shield against litigation?

Ms. HAMSHER. It does not, actually. We provided the information to them, because we voluntarily did the studies and cultural assessments, et cetera, that go into that. They didn't add anything new to that except for just get tribal consent, which they must have anyway to be able to dole out the drilling permit for the sub-surface parcel.

Mr. JOHNSON. Thank you.

Mr. Greczmiel, you acknowledge that fear of litigation drives agencies to create what you euphemistically called excessive documents. But you didn't propose how to remedy the phenomena. So, the question is, how do we get the agency folks in the trenches who understandably don't want to be dragged into courts to move away from this defensive bulletproofing of the EISs?

Mr. GRECZMIEL. I think one way that I successfully used when I was at CEQ was the training of those individuals on the ground who are doing the NEPA work. Because once they recognize that they don't need to throw in the kitchen sink, but focus their reviews on the issues that really matter, the document comes way down in size.

And it becomes defensible, as well, because the court is not going to require, and has not required in the past, that agencies examine issues that are not going to be potentially significant or important.

Mr. JOHNSON. In terms of providing the training, is that about focusing on clarity, so that they can focus on minimizing impacts and realistic alternatives, and actually moving forward with projects? Is that a component of it?

Mr. GRECZMIEL. That would be a component of it. OJT training does not work because they look at how things have been done in the past. We need to train people to take advantage of the efficiency of the process, the lessons learned, and the initiatives that have advanced it.

Mr. JOHNSON. I am out of time, I yield back.

Mr. THOMPSON. The gentleman's time has expired. I am now pleased to recognize Mr. Gallego for 5 minutes.

Mr. GALLEG0. Thank you, Mr. Chair.

Mr. Greczmiel—and I apologize if I destroyed your last name, people do the same to mine—Gallego, Gallego.

[Laughter.]

Mr. THOMPSON. We are going to have to practice.

Mr. GALLEG0. That is OK.

Could you give me some good examples of how the NEPA process has been used to help minimize the negative impacts of rushed, dangerous, or just poorly planned Federal projects, in general?

Mr. GRECZMIEL. I would refer to my written testimony, where I gave four examples, four cases where, as a result of litigation, the project was actually improved. There are numerous others that I can point to in the oil and gas arena, as well.

And in that forced management, which has come up here in several of the questions, the Siskiyou National Forest Watershed Protection Project, the Hell's Canyon Comprehensive Management Plan, these are all examples of where very difficult NEPA processes worked with the communities.

Mr. GALLEG0. Can you give us some details in regards to what you saw, what occurred there that basically highlights the importance of NEPA, especially in some of these communities?

Mr. GRECZMIEL. In each of those, the communities were finally brought to the table and able to express their concerns, whether it was water, whether it was access to their lands, whether it was air issues.

And, as a result of that, they worked with the agencies to come up with alternatives. And each of those examples I gave, at the end of the day, the Federal agency ended up accepting, reviewing, and approving a project that was based on an alternative that had been developed in conjunction with the local communities and the local resource agencies that had to provide local permits, so that the projects could proceed.

Mr. GALLEG0. You mentioned something about an oil facility, I didn't catch it. If you could just go into detail with that, or what you were trying to say.

Mr. GRECZMIEL. I simply referred to the fact that in the oil and gas industry we see a lot of that, as well. County commissioners have gotten very engaged in land management plans, in oil and gas development plans. And as a result of that, those plans have been improved over time.

A lot of it is location. And people who want to advance projects, the proponents and the developers know that if they talk to the people and figure out where the pressure points are going forward, they have a much better concept of how to route a pipeline, where to put an oil and gas development project, where to approve the APDs. It is that up-front communication that has to take place that hasn't been, but is now slowly beginning to.

And I would also point out that when we measure time, we start and we end. A lot happens in between. And I would commend to the Committee to take a look at the permitting dashboard that is now up. Granted, it doesn't cover every Federal project, but it will give a good picture of just exactly what are the things that happen during the development of a project. Does it add time just because NEPA exists, or does it add time because the project has changed, and the analysis has to go back and take a look at a new aspect of it?

So, there are a lot of things that could merit further study. And I would submit one of the things that would be to take a look at those results that are going to start coming in when the agencies

implement that transparent dashboard and we see what is actually happening during the development of those projects.

Mr. GALLEGO. Mr. Chair, I yield back.

Mr. THOMPSON. Mr. Gallego yields back.

Mr. GALLEGO. Getting better.

[Laughter.]

Mr. THOMPSON. Now I am pleased to recognize the gentleman from Michigan, Mr. Bergman, for 5 minutes.

Mr. BERGMAN. Thank you, Mr. Chairman. Thank you to all of you for your testimony today.

When you live in the middle of a million-acre national forest, you have a slightly different view of what boots on the ground or trees on the ground mean, because you, in some cases, work around them, or you have to sometimes pull your chainsaw out as you drive down a road, because it has been blocked by a tree that should have been cut a while ago, but was not healthy any more, and what happens when you lose your vibrancy, you fall down.

So, in our neck of the woods—and that is a literal statement—when you think about the stakeholders, whether it be the property owners who have private lands there, whether it be the tribes who have tribal lands, whether you have the Federal or the state lands, in forestry it is about partnerships that do several things.

Number one, maintain the health of your forests and your environment. Far and above everything else.

Number two, do it in a collaborative way that takes the inevitable acts of God in a lot of cases—lightning strikes creating fires, different things, floods—and work through those differences to optimize results, but also move forward in how we do our assessment of results.

So, having said that, in working in those multiple layers, those local boots on the ground, no matter who they might represent, are the best stewards of that environment, and also the best assessors, based on their local history.

Ms. HAMSHER, using the project you talked a little bit about in the Wayne National Forest, are there any specific differences that you observed in how the state of Ohio conducted their state environmental review process versus the BLM's environmental review? Were we stepping on each other? Were we totally separate? Was it complementary?

Ms. HAMSHER. There are many duplicative things. Extensive requirements on the state side are up front of building the well site, getting the permits, et cetera. I found that in doing the state requirements it was easy then to give the BLM the materials that they needed to be able to write the environmental assessment.

Mr. BERGMAN. When you said “duplicative,” could those in an honest, after-action report of this particular project, and doing lessons learned, is there an atmosphere to reduce the duplicative nature, or just keep your checklists duplicative and still waste time and money?

Ms. HAMSHER. Right. And, certainly, with the way that the Wayne National Forest is broken up, there are a lot of private surface owners that are not realizing their own property. Through the Ohio version of the permitting process, everything has been done the same as it would have been with the BLM.

Mr. BERGMAN. Thank you.

Mr. Coleman, in your testimony you explain how the average time for NEPA environmental reviews keeps growing, expanding. How have separate state and Federal reviews on the same project contributed to the growing delay? And is there a benefit to conducting one environmental review that satisfies both state and Federal requirements?

In other words, as we are talking about getting rid of duplicative time-wasting, dollar-consuming processes.

Mr. COLEMAN. Well, that is a particular problem for energy transport, where we have all these new, lower-cost, cleaner resources, we have lowered the cost of wind production, we have lowered the cost of solar production, oil, natural gas.

And increasingly, for the projects that are regulated typically by the states, which is the oil and power projects, we see a push to have the Federal Government do a full review on top of that. And for the projects that are regulated by the Federal Government, which is natural gas, you see the states trying to do their own environmental review on top of that.

And I would say that there is a need to have just one decision maker. The issues are important, but they should only be resolved once, whether that is the Federal Government or the states.

Mr. BERGMAN. Thank you, Mr. Chairman. I yield back.

Mr. THOMPSON. The gentleman yields back. I think we have all of our questions in.

I want to thank the witnesses for your valuable testimony, and the Members for their questions. The members of the Committee may have some additional questions for the witnesses, and we ask you to respond to these in writing. Under Committee Rule 3(o), members of the Committee must submit witness questions within 3 business days following the hearing by 5:00 p.m., and the hearing record will be open for 10 business days for these responses.

If there is no further business, without objection, the Committee stands adjourned.

[Whereupon, at 4:00 p.m., the Committee was adjourned.]

[ADDITIONAL MATERIALS SUBMITTED FOR THE RECORD]

Rep. Bishop Submissions

Three Benefit/Cost Biases and Reform of the National Environmental Policy Act

Statement for the Record by Benjamin Zycher
American Enterprise Institute for Public Policy Research
[The views expressed are the author's alone.]

May 2018

On April 25, 2018, the Committee on Natural Resources, U.S. House of Representatives, held a hearing on “The Weaponization of the National Environmental Policy Act and the Implications of Environmental Lawfare.” This submission for the record discusses the need for reform of that law in the context of standard benefit/cost analysis and the obstacles to such analysis created by the law as now implemented.

The National Environmental Policy Act of 1969 is the basic law under which federal reviews of the environmental impacts of proposed construction projects and the like are conducted. NEPA is in need of substantial reform by Congress, because it has created a heavy bias in favor of the infrastructure status quo, and against

new projects even if the latter would yield important environmental improvements compared with the existing state of affairs, in particular in terms of the likelihoods or levels of damage, accidents, and the emission of various effluents. This status quo bias is exacerbated by the “completeness” requirement and by a crucial cost-shifting problem, the combination of which prevents sound benefit/cost analysis of proposed projects and other environmental concerns under NEPA.

All environmental policy both in principle and as applied is (or should be) an exercise in benefit/cost analysis: Are the benefits of a given policy or project prospectively larger or smaller than the potential adverse effects, when the environmental effects of relevant alternatives are included in the analysis. This general point is obvious: There is no such thing as a project or, indeed, other human endeavor that does not create some adverse environmental effect, however broadly defined. Clearly, we are not willing to reject *all* new projects—an extreme outcome even among extreme outcomes—in substantial part because a growing population demands more physical capital, because shifts in demand and cost conditions across sectors implies resource flows among those sectors including capital investment, and because the inexorable physical depreciation of the existing capital stock means that a rejection of all new investment would return humanity to a state of nature.¹ In short: At some point the marginal costs of environmental protection exceed the marginal benefits, which is why virtually no one chooses to live in a pristine state of nature.²

Accordingly, modern societies evaluate tradeoffs among capital investments and other such projects and environmental effects, using a broad range of approaches and applications of various parameters. This explicit or implicit benefit/cost analysis properly considers the effects of a given project compared with the status quo, and not only on its own terms. And such proper benefit/cost analysis should balance the adverse effects of both insufficient review (too little attention to the potential adverse effects of the proposed project) and those of excessive delay (too little attention to the potential benefits of the proposed project). This latter tradeoff is similar to the standard “type 1/type 2” error problem in statistics, in which the type 1 error is rejection of the null hypothesis when it is true, while the type 2 error is acceptance of the null hypothesis when it is false.

The status quo bias. NEPA reviews concentrate only on the potential adverse effects of the proposed project under consideration, even if that project, whatever its attendant asserted problems, would yield a clear and significant reduction in the likelihood of environmental damage, or reductions in the costs of achieving lower levels of risks. Consider for example a proposed pipeline that would transport petroleum products currently moved by railroad or by trucks. The following table summarizes this comparison of adverse incidents for the U.S. during 2005 through 2009.

Petroleum Transport Adverse Incidents, 2005–2009

Mode	Average ton-miles/ year (billions)	Average incidents/ year	Incidents/billion ton- miles
Trucking	34.8	695.2	19.95
Railroad	23.9	49.6	2.08
Liquid pipeline	584.1	339.6	0.58
Natural gas pipeline	338.5	299.2	0.89

ASource: Diana Furchtgott-Roth and Kenneth P. Green, “Intermodal Safety in the Transport of Oil,” Fraser Institute, October 2013, at Table 8, at <https://www.fraserinstitute.org/sites/default/files/intermodal-safety-in-the-transport-of-oil-rev3.pdf>.

The vastly greater safety of pipelines over trucking and rail transport of petroleum products is manifest; but NEPA reviews of proposed pipeline projects shunt

¹Note that a proscription of all projects—capital investments—on environmental grounds would yield a sharp reduction in aggregate wealth, and thus a decline in the aggregate willingness and ability to preserve environmental quality. For a discussion of this relationship between aggregate wealth and environmental conditions, see e.g. Soumyananda Dinda, “Environmental Kuznets Curve Hypothesis: A Survey,” *Ecological Economics*, Vol 49 (2004), pp. 431–455, at <ftp://ftp.soc.uoc.gr/students/aslanidis/My%20documents/papers/Dinda%20%282004%29.pdf>.

²Consider a *homo sapiens* baby borne in a cave some tens of thousands of years ago, in a world with environmental quality essentially untouched by man. That child at birth would have had a life expectancy of about ten years. Had it been given the choice it obviously would have opted for a certain decline in environmental quality in exchange for better housing, food, water, medical care, *ad infinitum*. In other words, that child would accept, eagerly, a massive investment program in infrastructure at the expense of some environmental quality, which is to say that environmental quality is one important dimension of the capital stock among many, and across which there are tradeoffs.

this larger context aside, focusing only on the environmental effects of the proposed pipeline itself. This myopia is inconsistent with the larger goals of improved safety and reduced environmental risks, but is a direct consequence of the implementation of NEPA as written.³ This is particularly the case as technological improvements and other such advances enhance the environmental performance of new infrastructure projects relative to existing ones. A reform of this law by the Congress would yield environmental improvement and reduced costs for capital investment.

The “completeness” requirement. Under *Scenic Hudson Preservation Conference v. Federal Power Commission*, the second circuit held that the project under consideration could be approved only if “the record on which it bases its determination is complete.”⁴ The need for a “complete” record is an obvious route toward endless litigation and delay, in that there is no limiting principle that would exclude consideration of any given potential environmental impact, regardless of how trivial or speculative.⁵ Such delay is inconsistent with the need for any modern economy to improve and replace infrastructure as it depreciates or becomes obsolete, whether economically or physically. And, again, it is inconsistent with the increased aggregate wealth needed for a growing population to maintain and improve environmental quality.

Epstein makes the obvious and correct point that for any project there is a hierarchy of potential effects, from the large and significant, to the small and insignificant, to the trivial.⁶ This list of potential effects, almost literally, is endless. Any reasonable review of a major proposed capital investment, intended to provide services and pose some environmental risks for many years under conditions of uncertainty, cannot do much better in terms of environmental protection than to focus on major impacts while insisting on lower-risk designs, ongoing inspections, and other procedures intended to avoid and to mitigate risks and adverse events as they emerge.

Ex ante examination of any and all risks—“completeness”—is preposterous in an economy in which capital investments must be made so as to avoid impoverishment and, indeed, environmental degradation.⁷ A reform of NEPA in this context would require that the Congress define the nature and magnitude of significant risks and environmental impacts, with less rather than more interpretive flexibility for the administrative agencies, under the reasonable assumption that the vast array of less-significant, small, and trivial risks are too lengthy to examine in detail, and that the very large number of such factors will tend to cancel them out as a whole, in particular when such less-important impacts are viewed across the vast array of proposed projects.

The cost-shifting problem. Not all environmental impacts are worth avoiding. That is, the benefits of a given project may outweigh any adverse environmental impacts, however defined, a truism that is the beginning of sensible benefit/cost analysis in this context.⁸ In order for decisionmakers systematically to achieve that end, they must receive the benefits and bear the costs of their decisions. Because the NEPA regulatory approach does not require compensation for asset owners—unlike the case under a takings approach—the law in effect allows Congress to demand a maximalist protection of environmental values without bearing any of the costs of doing so, in this case in terms of some sort of required budget outlay. NEPA demands that regulators

“use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature

³See Benjamin Zycher, “The Environmental Left and Keystone XL,” *The National Interest*, January 27, 2017, at <http://nationalinterest.org/feature/the-environmental-left-keystone-xl-19216?page=show>.

⁴354 F.2d 608, 1 ERC 1084 (2d Cir. 1965). The decision can be found at <http://elr.info/sites/default/files/litigation/1.20292.htm>.

⁵For a very useful discussion of the relationship between NEPA and the traditional common law, see Richard A. Epstein, “The Many Sins of NEPA,” forthcoming, *Texas A&M Law Review*, Vol. 6, Issue 1.

⁶*Ibid.*

⁷This raises the interesting issue of the precise goals of the mainstream environmental movement. As a rough generalization, is it environmental protection or simple obstructionism? This question is not addressed here.

⁸For the classic discussion of this point, see Ronald H. Coase, “The Problem of Social Cost,” *Journal of Law and Economics*, Vol. III (October 1960), pp. 1–44, at <https://www.law.uchicago.edu/files/file/coase-problem.pdf>.

can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.”⁹

Note the absence of any cost considerations or benefit/cost balancing parameters. This means that regulators are empowered—indeed, that they have a duty—to regulate projects in such a way that marginal costs are guaranteed to exceed marginal benefits, because government is instructed in effect to “protect the environment” without consideration of the explicit or implicit costs of doing so. As an aside, this system provides perverse incentives for private parties as well, because they bear all of the costs of environmental protection while most of the favorable effects accrue to the benefit of others. Hence, the “shoot, shovel, and shut up” phenomenon.

An economy in need of constant capital investment in the face of a growing population, economic shifts, technological advances, depreciation of existing capital, and growing demands for environmental improvement should strive to balance such needs with the imperative of environmental concerns. The NEPA as currently written and enforced is inconsistent with that basic benefit/cost goal, a condition that should induce the Congress to reform this law so as to eliminate the three central problems discussed above.

A Critique of Current Practices Under NEPA

Statement Submitted for the Record

Richard A. Epstein

May 10, 2018

Dear Chairman Bishop & Ranking Member Grijalva:

I am writing this short Memorandum to outline what I think to be some serious difficulties in current administration of the National Environmental Protection Act (NEPA), both in its conception and execution. In so doing, I am taking issue with two earlier letters that you have received. The first is from 117 law professors, writing under the Auspices of the Center for Progressive Reform, who specialize in environmental law and related issues, which was sent to this Committee on April 24, 2018. The other is from Horst Greckmiel, which was delivered to this Committee of April 25, 2018.

By way of background, I am familiar with the basic structure of NEPA from my past involvement in the area of environmental law. More recently, my involvement with NEPA was first hand because of the work that I did as a consultant for the GAIN Coalition—Grow America’s Infrastructure Now. GAIN was in no way involved in the preparation of this Memorandum. But my work for GAIN has given me a greater appreciation of the difficulty and complexity of many of the issues that have arisen in connection with the ongoing litigation over the completion of the Dakota Access Pipeline (DAPL) and the Bayou Bridge Pipeline (BBP). These are two massive projects whose completion has been delayed by the sustained opposition from a variety of environmental groups. At the end of this Memorandum, I list some of the short articles that I wrote addressing these and other issues under NEPA.

Big Cases and Technological Progress

At the outset, it is important to note that it is these big cases that in many ways determine the success or failure of the NEPA regime. It is of course the case that most proposed projects receive “categorical exclusions” from NEPA. But the cases that count are those larger projects that trigger full scale opposition, not those that are no consequence under any environmental regime. As the environmental law professors note in their submission, in these cases the average duration has risen to 4.6 years in 2012 to 5.1 years in 2016. The costs of these delays are measured not only in the carrying costs of running large projects, but often in the delay of getting new projects into service which present far lower environmental risks than the projects that they displace. Yet it is striking that neither of these letters look at all at the pipeline cases to see whether they represent a process that has worked effectively or one that needs serious revisions. Indeed, the issue is especially important because the passionate and misguided opposition was harmful to both key environmental values on the one hand and to the overall level of growth and prosperity on the other. In short, new pipelines seriously reduce the risk of the major damage that can result from the shipment of crude oil or natural gas by truck, rail, or even older

⁹See section 101 (a) of NEPA, at https://www.energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/Req-NEPA.pdf.

pipelines as point properly stressed by Benjamin Zycher in his submission to this committee, The Status Quo Bias and Reform of the National Environmental Policy Act, May 2018. The advances in pipeline technology are substantial, so that it is imperative to get new facilities and equipment in place as soon as is possible. Any favorable evaluation of NEPA that ignores these major issues is necessarily inaccurate and incomplete.

In stating my criticism of NEPA, I want to make it crystal clear that I am not in favor of eliminating either federal or state regulation (much of which takes the form of local NEPA programs) of new projects that have potential environmental impacts. Instead the issue is setting the appropriate framework in which the analysis should take place. In dealing with this issue, several caveats should be noted. The first is the major shift in technological advances since NEPA went into effect on January 1, 1970. To read these two defense of NEPA, it is as though the world of technology has not changed since the catastrophic Santa Barbara oil spill took place in 1969, when the technology for both drilling and clean-up were in their infancy. As technology in both these areas has improved markedly in the last 48 years, we should expect that the potential levels of danger should go downward, not upward. It is therefore something of a disturbing anomaly that the larger capital prospects now take longer to evaluate than earlier, even though they are safer than older projects on virtually every relevant dimension.

The enormous strides in technology and engineering have transformed the environmental landscape, so that in virtually every area the design, construction, maintenance and operation of various projects are far safer and more reliable than they have ever been before. This issue is most evident in connection with the shipment of crude oil and natural gas through pipelines, which are markedly safer in every respect than they were even a decade ago, let alone the nearly 50 years since President Nixon signed NEPA into law on January 1, 1970. These pipelines are engineered to very high safety standards. They are far safer for the transportation of crude oil than the railroad cars and trucks that are commonly used for this purpose. The pipelines operate in controlled environments. These systems are equipped state-of-the-art monitoring devices that allow them to be shut down quickly in the event that any malfunction is detected. The newer pipelines are buried deeper in the ground than older pipelines, which necessarily suffer from some degree of wear and tear. Yet unfortunately, the dangers from keeping the status quo ante in place were never once discussed in two exhaustive decisions by Judge James Boasberg, here¹ and here,² in the District Court for the District of Columbia, and the single decision³ issued by Judge Shelly Dick in the District Court of Middle District of Louisiana on February 27, 2018.

Political Resistance to Infrastructure Improvement

More regrettably, the major technological advances have been ignored by the opponents of both DAPL and the BBP instances. In connection with these pipelines, the term “Lawfare” accurately describes the full scale opposition to the completion of both these pipelines. Even though the DAPL pipeline is complete, and the BBP nearly so, there is still the possibility that they might be shut down on the grounds that there is some legal hurdle that they have not yet cured—even though it is far more dangerous to let a complex facility sit idle than it is to use it in the way in which it is intended. It should be perfectly clear that the NEPA proceedings on pipelines should address their compliance under the various substantive statutes, such as the Clean Water Act. They should *not* be used as an indirect means to attack the use of fossil fuels on the ground that they contribute to global warming or for the rectification of past injustices. But this is exactly the terms in which the opponents to the DAPL pipeline continue to express their concern. Here is one explicit acknowledgement of the difficulty from a prominent environmental group.

When environmental groups coalesce against a pipeline project today, they are doing so because further fossil fuel development that ignores the accumulated legacy costs is simply unfair to future Americans (let alone the average Pacific Islander). It is an injustice, pure and simple. But it is both a national and a local injustice and that compound context complicates any analysis immensely.

¹ https://scholar.google.com/scholar_case?case=11177895659901541796&q=standing+rock+sioux+tribe&hl=en&as_sdt=6,33.

² [https://scholar.google.com/scholar_case?case=15125037573949037207&q=Standing+Rock+Sioux+Tribe+v.+U.S.+Corps+of+Engineers+Civil+Action+No.+16-1534+\(JEB\)&hl=en&as_sdt=400006](https://scholar.google.com/scholar_case?case=15125037573949037207&q=Standing+Rock+Sioux+Tribe+v.+U.S.+Corps+of+Engineers+Civil+Action+No.+16-1534+(JEB)&hl=en&as_sdt=400006).

³ <https://earthjustice.org/sites/default/files/files/ABK-et-al-v-Corps-Ruling.pdf>.

Opposing the Dakota Access Pipeline's crossing the Missouri River directly upstream of the Sioux Indian Nation's water intakes was justified *both* because it was an affront to the Standing Rock people *and* as a symbolic gesture against still more generations of Americans made to depend on 'cheap' fossil fuels.

Jamison Colburn, The 'Weaponization of NEPA: A Hyper-Partisan Time for Bi-Partisan Solutions, April 30, 2018, available at <http://www.nepalab.com/?p=1601>.

I put aside that these sweeping generalizations are offered as if they were self-evident truths, to make this simple procedural point. Debates over these contentious issues are perfectly appropriate for Congress, where they can, and should be, met by opposition from those who take different view. But they have no role to play in the determinations that are made in the case of individual applications. The admission that NEPA is a vehicle through which to raise these issues shows the serious risk of abuse of the NEPA project. It may well be that environmental groups like the Sierra Club and EarthJustice oppose on pipeline construction on these political grounds. But objections raised under NEPA should not be turned into a proxy war against the completion of DAPL or the BBL which, as the Army Corps of Engineers has demonstrated, presents no serious environmental risks. The risk of stranding billions of dollars in infrastructure investments from one or two projects is not something that Congress should overlook. Nor should it turn a blind eye to the massive dislocation that closing down pipelines has both in the production and distribution of fossil fuels.

The Expansion of NEPA

The next question is why NEPA has in many large cases turned out to create these long and complex disputes. Much of the explanation lies in a key 1971 decision by the late Judge J. Skelly Wright in *Calvert Cliffs' Coordinating Committee v United States Atomic Energy Commission*, which authorized private rights of action by any private individual or group that sought to set aside any permit that had been issued by the applicable Federal agency—in this instance the United States Atomic Energy Commission. Indeed, one of the major factors that led to the implosion of the nuclear power industry in the 1970s was the string of successful lawsuits that were brought against the construction of new nuclear power plants. Yet in 1971 Judge Wright welcomed a development that in his words marked “only the beginning of what promises to become a flood of new litigation—litigation seeking judicial assistance in protecting our natural environment.”

Before *Calvert Cliffs*, NEPA was a statute that was intended to allow an agency to collect relevant information. This one decision marked a huge transformation in NEPA. What was once a statute that sought to allow the agency to consider all relevant issues from all points of view before making its own final decision of how any statute should be applied. But once judicial review was allowed, the parties who were most opposed to the new project could dominate the judicial examination as to whether and if so how, project should proceed. It has often been said that NEPA is only a “procedural” statute, as if that designation somehow minimizes its impact on project development. But issuing a blanket injunction when there is not actual or threatened harm is an extraordinarily powerful remedy that can inflict great hardship on any private or public project which can find large investments tied up for years until endless list of disclosures is finally made, at which point the project in question may have to be abandoned or modified because it is over budget or no longer needed.

It is even more unfortunate that since the key 1983 Supreme Court decision⁴ in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co*, NEPA and the Administrative Procedure Act often read together, such that the “arbitrary and capricious” standard contained in Section 706(a) of the APA is read to require “hard look” review by a court. That hard look standard is often read to mean that the omission of any relevant issue under the applicable substantive standard, or the consideration of any irrelevant issue is enough to bring the approval process to a halt. No complex Environmental Assessment or Environmental Impact Statement can meet that standard, if it has to cover thousands of issues and disregard thousands of others. The correct interpretation of arbitrary and capricious as it applies to the overall agency determination is whether it makes a good faith effort to balance what it considers the relevant factors. On this view, rarely if ever would a determination be set aside because it considers something that a court regards as irrelevant or regards disregards something that is relevant.

⁴ https://scholar.google.com/scholar_case?case=759595841034114890&q=State+Farm+Insurance+v.+1983&hl=en&as_sdt=6,33.

So long as the *overall* effort is conscientious and in good faith, the determination should stand, even if a court disagrees with the factors that should be weighed, and the weight to be attached to each of them.

The situation in NEPA cases can easily get worse because the standard judicial remedy in these cases is “vacatur,” such that the permission given for the EA or EIS is revoked, and the process has to start over again, where yet another round of hearings can be required, so that delay become institutionalized. The defenders of NEPA point out that there are often multiple sources of delay that do not directly implicate NEPA, but that observation offers no excuse for the delays that are introduced whenever a court or an administrative agency decides to turn up the heat on any proposed project subject to NEPA review. Indeed, one of the conspicuous forms of political misbehavior in connection with the DAPL pipeline were the decisions of high officials in the Obama administration to impose additional delays that overrode decisions of the Army Corps of Engineers and Judge Boasberg, both of which had allowed these projects to go forward. NEPA has too much play in the joints if allows political appointees to override the technical decisions that have approved various projects.

What Should be Done?

Plainly something should be done to address the NEPA logjam in major cases. Here are two key paths to improvement.

First, one important recent step was taken in Executive Order 13807, of August 15, 2017, which requires the review of “major infrastructure projects” as One Federal Decision, which was followed up on March 20, 2018, with a Memorandum for Heads of Federal Departments and Agencies. The more linear the process, the fewer the delays and inconsistently.

Second, in dealing with the appropriate cost/benefit analysis in major cases, several changes in approach are needed. Any NEPA review should always include an explicit discussion of the environmental harms that will be averted or alleviated by prompt completion of the existing project. Where those are overwhelming, as is the case with new pipelines, the appropriate response is to begin construction as soon as possible once the basic plans have been approved. Thereafter as problems emerge, these should be addressed onsite by both the project developers and government oversight, with a view to stopping serious problems before they emerged. By delaying the review process, until these concrete issues arise, both time and money can be saved by *not* addressing remote contingencies that may never occur. In response, the defenders of NEPA often say that it is important to “look before you leap.” But in a NEPA review, there should never be any leaps at all. A far sounder procedure is not to front-load the review process so that everything is discussed ad nauseam before anything constructive can be done. With improved technology the correct approach is to stagger the inspection program in a timely fashion.

Third, concerns with safety issues are, moreover, should not only be addressed by the NEPA process. It is important to insist that the developer of any new project be held strictly liable for the damages inflicted by leaks and discharges of all kinds and descriptions. It is also wise in most cases to insist that the project developer take out liability insurance against these risks so that a second pair of eyes can be brought to bear on the development of the project.

Conclusion

The success or failure of NEPA reform requires that Congress and the agencies understand that the object of these reviews is to facilitate technical progress that will both help the environment and spur economic growth. It is not to stifle needed development. The letters written by the law professors and Mr. Greczmiel never own up to the important implications that follow from this simple observation. The status quo for major projects should not be allowed to stand.

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Osage Minerals Council

Statement Submitted for the Record

May 9, 2018

Thank you Mr. Chairman and Members of the Committee for the opportunity to share with you the Osage Mineral Council's ("OMC") concerns and recommendations regarding the National Environmental Policy Act ("NEPA"). The OMC is the tribal governmental body recognized under the Osage Allotment Act of June 28, 1906, 34 Stat. 539, as amended ("1906 Act") and by the Osage Nation Constitution, Article XV Section 4, to administer, develop, and protect the Osage Mineral Estate.

The Osage Nation is the beneficial owner of the Osage Mineral Estate, which consists of all mineral interests below the surface of Osage County, Oklahoma. The 1906 Act lays the framework for regulation of oil and gas activities on the Osage Mineral Estate. Pursuant to the 1906 Act, the Bureau of Indian Affairs ("BIA") is required to regulate the Osage Mineral Estate in such a way "that the highest percentage of ultimate recovery of both oil and gas may be secured." 34 Stat. 539. This includes the BIA's implementation of NEPA. However, new development of the Osage Mineral Estate is currently stagnant, due primarily to the unnecessary imposition of NEPA requirements on any and all development of the Estate.

Development of the Osage Mineral Estate has been ongoing since 1895. The OMC is aware of no serious environmental effects of oil and gas development on the Osage Mineral Estate that warrant preparation of repetitive environmental assessments ("EA") or an environmental impact statement ("EIS"), yet the BIA is requiring an EA for every lease, every workover, and every new drilling permit it approves. In fact, the OMC has no knowledge of an EA for oil and gas activities on the Osage Mineral Estate resulting in anything other than a "Finding of No Significant Impact." Most of the wells on the Osage Mineral Estate are "stripper wells" that produce marginal oil and gas—less than 10 barrels per day. The BIA's NEPA procedures are critical to the income of the Osage Mineral Estate shareholders, known as headright holders, because they affect the cost, lead time, and even attitudes of oil and gas operators whose discretionary investments sustain production. The exorbitant costs entailed in preparation of an EA for activities to develop a mineral estate such as ours inhibit growth because it is simply not economically feasible to undertake these environmental studies.

The stagnation of Osage Mineral Estate development can be traced to the Office of the Special Trustee ("OST") and the Solicitor's Office. Following the \$3.4 billion Cobell Trust Settlement in December of 2010, the OST maneuvered its way into the management of the Osage Mineral Estate and the results have been disastrous. OST frequently influences BIA management of the Estate, not for the benefit of the Osage or to maximize oil and gas production, but in furtherance of OST's mission—to limit the liability of the U.S. to Indians. The result has been a significant stifling of oil and gas production, as well as other minerals, within Osage County. The Osage Mineral Estate has been developed for over 100 years, and only recently have these problems arisen. Private, non-Indian land owners challenged NEPA compliance, and the BIA has overreacted to these challenges due to the involvement of the OST and Solicitor's Office. The same thing happened during the negotiated rule-making "neg reg" process, where OST and BIA tried to overtake responsibilities of the Tribe in an effort to avoid liability. The actions of the BIA and OST in the neg reg process were overturned in court. The OST and Solicitor's Office are now responsible for enforcing unnecessary NEPA requirements because of their concerns with

potential breach of trust litigation and the potential liability of the United States for damages. The OST is requiring excessive NEPA compliance that makes the development of the Osage Mineral Estate cost prohibitive. Consequently, operators are not developing in Osage County, which harms the Osage Nation and its members and headright holders.

Following the Cobell settlement and the remedial actions taken by the federal government, there is no longer a need for the OST. One positive result of the Cobell settlement is that it created and implemented good trust management systems. Now, OST has outlasted its purpose and needs to be sunsetted as Congress directed in the Indian Trust Asset Reform Act of 2016, 130 Stat. 432, and all of its staff and funding returned to the BIA so that it can manage the non-monetary trust assets of Indian tribes in a manner that allows for maximum development and revenue. Overall, the OST and its solicitors are breaching their trust responsibility in the name of NEPA compliance and putting the liability of the United States before and above its trust responsibility. The OST needs to be sunsetted because the Cobell and other tribal breach of trust cases are over, better trust management practices have been instituted, and the BIA should now manage the nonmonetary trust assets as required by Congress and federal common law. Post-Cobell, the BIA is able to properly manage the IIM accounts, and resources can be redirected from the OST to the BIA to properly serve and assist tribes.

A threshold issue regarding Indian tribes and NEPA is whether NEPA should apply to Indian lands at all. Although it is well established in caselaw and regulations that NEPA applies to major federal action on Indian lands, typically triggered by approval of leases by the Bureau of Indian Affairs, this was not always the case. In fact, the legislative history of the NEPA gives no indication of whether Congress considered NEPA's application to Indian lands or whether Secretarial approvals of Indian leases constitute major federal actions.

Absent any evidence to the contrary, it is logical that Congress did not intend to subject the discretionary execution of fiduciary duties imposed on the government by the trust responsibility and various federal statutes to the procedural and bureaucratic stranglehold that NEPA imposes on development. To impose the burden of NEPA on private Indian land places the Indians at an economic and competitive disadvantage when compared to non-Indian competitors not subject to NEPA, and subjects the development to their property and resources to judicial challenge by those with no connection to the land or affected community.

Put another way, subjecting development on Indian lands to NEPA places Indian landowners in a uniquely disadvantageous position, where they not only must secure federal approval for almost any transaction involving the development of their lands, but then they must also wait months, and in some circumstances years, for federal government administrators to comply with NEPA before approval for development can be obtained. This scenario directly undermines the role of the government as trustee, where the government's duty to approve leases of Indian land if they are in the best interest of the landowners is directly supplanted by the requirement to burden the lease with competitive disadvantages of the administrative costs and delays associated with NEPA.

For example, in 2013, the Commission on Indian Trust Administration and Reform reported that the Department of Interior does not have adequate resources to meet Indian leasing demands for oil and gas development, including the resources to analyze and approve NEPA documents.¹ Additionally, according to a report from the Governmental Accountability Office ("GAO"), stakeholders, including Interior officials, have also highlighted this concern and "further identified inadequate staff resources as a contributing factor in lengthy review times and a hindrance to development of Indian energy resources."²

In addition to delays caused by the willful understaffing and underfunding of the BIA, the involvement of other federal agencies in the NEPA process also works against tribes in their efforts to develop their land and resources. During the NEPA process, a number of other federal agencies may become involved in review of the document, increasing both the number of approvals needed for authorization and overall delay of the project. These administrative inefficiencies cost tribes time and money related to potential projects. Specifically, as noted in the GAO report, industry stakeholders have:

[H]ighlighted the additional costs required for NEPA compliance and the uncertainty associated with public opposition and comments received

¹ *Report of the Commission on Indian Trust Administration and Reform*, Approved December 10, 2013.

² GAO-15-502 *Indian Energy Development*, June 2015 at 24.

during the NEPA process as factors that can cause a developer to avoid Indian energy resources and choose to develop non-Indian resources that do not require federal agency action.³

In the same GAO report, officials from the Department of Interior validated industry's claim, stating that "NEPA compliance reviews significantly increase the cost of conducting operations on Indian lands and, as a result, projects are moved to adjoining state or private lands where NEPA compliance is not required."⁴

From this evidence it is clear that the imposition of NEPA on the development of Indian lands has worked to increase the costs and delay of projects on Indian lands, driving developers away from Indian lands to lands that are not similarly burdened with NEPA's bureaucratic hurdles.

As such, the application of NEPA to Indian lands is antithetical to the duty of the United States owed to Indian tribes under the federal trust responsibility. It was on this basis that the United States initially resisted the application of NEPA to Indian lands in *Morton v. Davis*,⁵ and it is on this same basis that the OMC continues to object to the applicability of NEPA to development on tribal lands.

While the OMC appreciates the need for environmental protections, such protections must be no more onerous than necessary and must not infringe upon a tribe's right to develop its minerals and its economy. To that end, we recommend the following:

1. NEPA Should Limit Comments on On-Reservation Proposed Actions to Tribal Members and Immediately Surrounding Communities.

NEPA itself does not mandate agency consideration of public comments, but it does require that an EA or EIS be made available to the public. 42 U.S.C. § 4332(C). NEPA's implementing regulations, however, currently contain a number of commenting requirements that allow the entire public to provide input to the NEPA process for a proposed action. 40 C.F.R. §§ 1500.2(d), 1501.7(a), 1506.6; 43 C.F.R. §§ 46.235, 46.305, 47.435. These regulations speak broadly about involving and seeking comment from "the public" and exceed the requirements of NEPA itself.

There are no reasonable constraints on who may comment on a particular proposed action, and often an agency will receive voluminous comments from individuals and organizations far removed from any potential or purported impacts of the activity. This does not benefit the NEPA process, and it actually impedes the agency by creating the additional work of reviewing the generally irrelevant comments. Simply put, if an individual or organization is not in close enough proximity to a project to be impacted by it, the agency should not expend federal resources considering and responding to that individual's or organization's comments.

With respect to proposed actions in Indian country, public comment and involvement should be limited to tribal members and residents of immediately surrounding communities. This will greatly reduce agencies' time and resource expenditures and prevent outside influences from muddying the issues and injecting controversy into matters where none exists.

2. NEPA Should Allow Categorical Exclusions when Proposed Activities will Occur in Proximity to Existing Similar Activities that have Resulted in No Significant Environmental Effects for Five Years.

NEPA should be amended to include a provision categorically excluding activities when substantially similar activities have already been permitted in the area and those permitted activities have shown no significant environmental effects for the past five years. The regulations implementing NEPA currently permit agencies to develop categorical exclusions that exempt certain activities from NEPA's EA and EIS requirements. 40 CFR §§ 1500.4(p), 1500.5(k), 1501.4(a), 1508.4; 43 C.F.R. §§ 46.205, 46.210.

A new statutory categorical exclusion should be created to exempt proposed actions from NEPA's EA and EIS requirements if

- 1) the proposed action is a feature of, or substantially similar to, the already-approved action;
- 2) the proposed action would take place within the same analysis area as the already-approved action; and
- 3) the already-approved action has had no significant environmental impacts for the previous five years.

³ *Id.*

⁴ *Id.* at 26.

⁵ 469 F.2d 593 (10th Cir. 1972).

The Council on Environmental Quality encourages the use of categorical exclusions because they 1) reduce paperwork (40 C.F.R. § 1500.4(p)) and 2) reduce delay (40 C.F.R. § 1500.5(k)). Categorical exclusions also reduce the resources spent analyzing proposals which generally do not have potentially significant environmental impacts and enable an agency to direct resources to proposals that may have significant environmental impacts. 83 FR 9535. The same justifications for categorical exclusions support this new categorical exclusion the OMC proposes.

If an activity has been conducted for years without significant environmental impacts, it logically follows that conducting the same or substantially similar activities in close proximity to that existing activity, such that the environmental conditions are the same and have already been studied, will likewise produce no significant environmental impacts. It is therefore a waste of resources to expend time and money on EAs for those subsequent activities that, logic dictates, will not have significant environmental impacts. Codifying this categorical exclusion would substantially increase agency efficiency in complying with NEPA while relaxing the unnecessary restraints currently placed on oil and gas development on the Osage Mineral Estate and elsewhere where tribes rely heavily on natural resource development to support themselves and their citizens.

3. NEPA Should Permit Tiering to Existing NEPA Documents when Proposed Activities will Occur in Proximity to Existing Similar Activities.

Finally, NEPA should be amended to include a provision allowing an agency to “tier” to an existing NEPA document when the proposed activity is substantially similar to the activity assessed in the existing NEPA document and when the proposed activity would occur in the same analysis area studied by the existing NEPA document.

The regulations implementing NEPA currently allow an agency to tier to an existing broad EIS from a subsequent narrower EIS or EA. 40 C.F.R. § 1508.28. This makes sense because there is no need for the subsequent narrower EIS or EA to duplicate analysis already conducted in the broad EIS. Likewise, NEPA should allow an agency to tier to an existing NEPA document when the environmental conditions are the same. Those environmental conditions have already been studied and assessed in the existing EA, as have the impacts of the activity on the environment. As with the categorical exclusion described above, tiering in this manner would reduce delay and paperwork and conserve resources, all of which will level the playing field for the development of Indian trust resources and make energy development of Indian resources consistent with the broader regional norms of development.

4. The BIA should Adopt and Utilize Determinations of NEPA Adequacy (DNAs).

Determinations of NEPA Adequacy (“DNA”) are a NEPA compliance tool that is frequently used by the Bureau of Land Management (“BLM”) and should be equally utilized by the BIA. In accordance with the BLM’s NEPA Handbook, a DNA is simply a form of NEPA documentation that confirms that an action or actions have already been adequately analyzed in existing NEPA documentation and that, therefore, no further NEPA compliance is necessary. The benefit of utilizing DNAs is that the BIA would not need to conduct new NEPA analysis every time a new action is proposed or a new well drilled. Instead, as an alternative to categorical exclusions or in addition to categorical exclusions, the BIA could avoid conducting new NEPA analysis by relying upon existing NEPA analysis of oil and gas development in Osage County.

As noted above, oil and gas development has been occurring in Osage County for over 100 years and NEPA analysis has been completed innumerable times over many decades. No significant environmental damage or impacts from Osage oil and gas development have occurred in that time and no NEPA analysis has concluded with anything other than a FONSI. Despite this, an undue amount of NEPA analysis and compliance has taken place regarding production and development of the Mineral Estate. DNAs would be an easy solution for the BIA to avoid the burdensome, time-consuming, and costly NEPA processes while still complying with the mandates of NEPA and allowing for the maximum development of the Mineral Estate in furtherance of its trust duties. The BIA should adopt a procedure for the use of DNAs. These DNAs would confirm adequate analysis has been completed under NEPA and allow the Osage people to realize economic development and prosperity from the Mineral Estate.

Thank you for the opportunity to provide the testimony of the Osage Minerals Council on the problems we face under NEPA, the obstructions it currently places on development of the Osage Mineral Estate, and how NEPA can be amended to

remedy these issues. I hope that these recommendations will be duly considered and that positive changes can be made to minimize the unnecessary constraints NEPA places on tribal economic development and, specifically, development of the Osage Mineral Estate. Furthermore, it is the position of the OMC that the OST and its solicitors need to be sunsetted so that the BIA can function as a trustee without the undue pressure of OST on BIA for fear that activity may result in damages to the Indian beneficiary if they take action in furtherance of their trust responsibility. The BIA does not need a watch dog agency that curtails its ability to meet its trust obligations. The BIA needs to have all the Full Time Equivalent employees and the other budgetary outlays that have been taken from them by the OST so that the BIA can hire the appropriate trust management staff for the non-monetary trust assets of Indian country. Only then will the hard assets of the Tribal nations and their citizens be adequately developed and protected.

Ute Indian Tribe of the Uintah and Ouray Reservation

Statement Submitted for the Record

May 8, 2018

The Ute Indian Tribe of the Uintah and Ouray Reservation appreciates the opportunity to provide this testimony to the House Committee on Natural Resources' Subcommittee on Energy and Mineral Resources for its Oversight Hearing entitled the "The Weaponization of the National Environmental Policy Act and the Implications of Environmental Lawfare."

The Ute Indian Tribe is a major oil and gas producer and uses revenues from that energy development as the primary source of funding for our tribal government and the services we provide our members. We use these revenues to govern and provide services on the second largest reservation in the United States. Our Reservation covers more than 4.5 million acres, where the majority of our approximately 3,000 members reside.

Our tribal government provides services to our members and manages the Reservation through 60 tribal departments and agencies including land, fish and wildlife management, housing, education, emergency medical services, public safety, and energy and minerals management. The Tribe is also a major employer and engine for economic growth in northeastern Utah generally. Tribal businesses include a supermarket, gas stations, a feedlot, an information technology company, a manufacturing plant, Ute Oil Field Water Services, and Ute Energy. Our governmental programs and tribal enterprises employ approximately 450 people, 75% of whom are tribal members. Each year the Tribe generates tens of millions of dollars in economic activity in northeastern Utah. The Tribe takes an active role in the development of its resources as a majority owner of Ute Energy and owns numerous oil and gas wells on the Reservation.

Despite the progress we have made, our ability to fully benefit from our resources is limited through the application of the National Environmental Policy Act "NEPA" by federal agencies overseeing oil and gas development on the Reservation. As it stands, the application of NEPA is causing energy companies to limit their activities on the Reservation hampering the Tribe's economic development and the economic incentive for producers to operate on the Reservation. As a result, the Tribe is not able to fully develop its resources and revenues available for tribal operations are limited.

I. NEPA Should Not Apply to Secretarial Approvals on Indian Lands

A threshold issue regarding Indian tribes and NEPA is whether NEPA should apply to Indian lands at all. Although it is well established in caselaw and regulations that NEPA applies to major federal action on Indian lands, typically triggered by approval of leases by the Bureau of Indian Affairs, this was not always the case. In fact, the legislative history of the NEPA is silent of any indication of whether Congress considered NEPA's application to Indian lands or whether the Secretarial approval of Indian leases are major federal action.

Absent any intent to the contrary, it is logical that Congress did not intend to subject the discretionary execution of fiduciary duties imposed on the government by the trust responsibility and various federal statutes to the procedural and bureaucratic stranglehold that NEPA imposes on development. To impose the burden of NEPA on private Indian land places the Indians at an economic and competitive disadvantage when compared to non-Indian competitors not subject to NEPA, and subjects the development to their property and resources to judicial challenge by those with no connection to the land or affected community.

Put another way, subjecting development on Indian lands to NEPA places Indian landowners in a uniquely disadvantageous position, where they not only must secure federal approval for almost any transaction involving the development of their lands, but then they must also wait months, and in some circumstances years, before the federal government administrators comply with NEPA before approval for development can be obtained. This scenario directly undermines the role of the government as trustee, where the government's duty to approve leases of Indian land if they are in the best interest of the landowners is directly supplanted by the requirement to burden the lease with competitive disadvantages of the administrative costs and delays associated with NEPA.

For example, in 2013, the Commission on Indian Trust Administration and Reform reported that the Department of Interior does not have adequate resources to meet Indian leasing demands for oil and gas development, including the resources to analyze and approve NEPA documents.¹ Additionally, according to a report from the Governmental Accountability Office "GAO," stakeholders, including Interior officials, have also highlighted this concern and "further identified inadequate staff resources as a contributing factor in lengthy review times and a hindrance to development of Indian energy resources."²

In addition to delays caused by the willful understaffing and underfunding of the BIA, the involvement of other federal agencies in the NEPA process also works against Tribes in the efforts to develop their land and resources. During the NEPA process a number of other federal agencies may become involved in review of the document, increasing both the number of approvals needed for authorization and overall delay of the project. For operations on the Uintah and Ouray Reservation, the United States Fish and Wildlife Service will consult on the document under Endangered Species Act Section 7 authority and the Environmental Protection Agency will often consult on air and water quality issues. These administrative inefficiencies cost the Tribe time and money related to potential projects. Specifically, as noted in the GAO report, industry stakeholders have:

[H]ighlighted the additional costs required for NEPA compliance and the uncertainty associated with public opposition and comments received during the NEPA process as factors that can cause a developer to avoid Indian energy resources and choose to develop non-Indian resources that do not require federal agency action."³

The same GAO report, officials from the Department of Interior validated the claim of industry in stating that "NEPA compliance reviews significantly increase the cost of conducting operations on Indian lands and, as a result, projects are moved to adjoining state or private lands where NEPA compliance is not required."⁴

From this evidence it is clear that the imposition of NEPA on the development of Indian lands has worked to increase the costs and delay of projects on Indian lands, driving developers away from Indian lands to lands that are not similarly burdened with NEPA's bureaucratic hurdles. As such, the application of NEPA to Indian lands is antithetical to the duty of the United States owed to Indian tribes under the federal trust responsibility. It was on this basis which the United States initially resisted the application of NEPA to Indian lands in *Morton v. Davis*,⁵ and it is on this same basis that the Tribe continues to object to the applicability of NEPA to development on tribal lands.

However, to the extent NEPA currently applies to development on tribal lands, there are a number of actions that can be taken to minimize the regulatory burden imposed on developers and Tribes, and in doing so, promote tribal sovereignty.

II. NEPA Should Limit Comments on On-Reservation Actions to Tribal Members and Immediately Surrounding Communities

NEPA boldly proclaims that "each person has a responsibility to contribute to the preservation and enhancement of the environment."⁶ In doing so, it expressly contemplates input from the general public to help realize national environmental policies. The public is brought into the NEPA process in many ways. For example, major projects are required to prepare an EIS which must be published in the Federal Register for public review and notice and comment procedures are

¹ *Report of the Commission on Indian Trust Administration and Reform*, Approved December 10, 2013.

² GAO-15-502 Indian Energy Development, June 2015 at 24.

³ *Id.*

⁴ *Id.* at 26.

⁵ 469 F.2d 593 (10th Cir. 1972).

⁶ See 42 U.S.C. § 4331(c).

mandated in various circumstances throughout the NEPA process. Moreover, NEPA's implementing regulations stress public involvement by containing a number of commenting requirements to allow public input in the implementation of NEPA.⁷

These regulations speak broadly about involvement from "the public" and in doing so exceed the statutory requirements of NEPA itself. The regulations provide no limitations on who may comment on a particular project, opening up agencies to dutifully receive comments from individuals and special interest organizations that are often outside of the projects geographically impacted area. This regime does not serve the goals of the NEPA process and actively inhibits agencies by requiring them to review, and in many cases respond, to comments that are generally inapplicable or at the very least not representative of localized concern.

A one-size-fits-all approach to public participation in environmental decision making is not acceptable in the context of Indian lands. A system that was meant to promote inclusiveness and flexibility now runs amok with involvement from disinterested parties who have no real stake in the outcome other than their ability to impute their own values on actions that exclusively implicate local concerns. This broad implementation of public participation as it relates to development in Indian country has rendered it unwieldy, incoherent, and ad hoc.

Moreover, subjecting Indian energy development to NEPA's public participation regime by allowing the public to present concerns for consideration before BIA approves leases and permits has had a negative impact on overall development. In the same GAO Report referred above, it is noted that stakeholders highlighted the "uncertainty associated with public opposition and comments received during the NEPA process as factors that can cause a developer to avoid Indian energy resources and choose to develop non-Indian resources that do not require Federal agency action."⁸

To illustrate the problems associated with NEPA's current public participation regime, one needs only to look at the example provided by the recent attempts to close the Bonanza Power Plant located within the exterior boundaries of the Tribe's Uintah and Ouray Reservation. The Plant is a five hundred (500) megawatt power plant that burns approximately 2 million tons of coal annually, contributing untold amounts of air pollution on the reservation and destroying local flora and fauna within a vast swath of land surrounding the Plant. Because of these environmental consequences and the plant's location on the Reservation, the Tribe was steadfast in support of the Plant's closure when both the lease supporting the Plant and the Plant's operating permit were up for review.

However, during the ensuing meetings and hearing on the renewal of the Plant's coal lease and operating permit, the focus and attention was diverted from the inhabitants of the land who live with the consequences of the Plant on a daily basis, and was instead placed on the Coal mining company and various national public interest groups. In doing so, industry and public interests groups successfully hijacked the NEPA public participation process to realign the discussion to address their concerns and impose their individual ethics on decisions exclusively impacting tribal lands.

In sum, the reality is that certain individuals or organizations participate in NEPA's public participation regime regardless of their proximity to a project or its impacts. In these cases, agencies can expend untold federal resources considering and responding to comments that only detract from the views that matter most, those of local concern.

As such, with respect to NEPA's application to Indian lands, public participation should be limited to tribal members and residents of immediately surrounding communities. This will greatly reduce the time and resources agencies expend and prevent outside influences from muddying and complicating the issues and injecting controversy where none exists. Moreover, this will further the government's trust obligations to Tribes by eliminating the uncertainty developer's face associated with public opposition and comments received during the NEPA process. This policy makes sense from a Tribal sovereignty perspective, as members of the public who are not Tribal members should not have any say over Tribal development projects. Instead, tribal voices should have primacy in any discussion regarding the use and development of tribal lands and resources.

⁷ 40 C.F.R. §§ 1500.2(d), 1501.7(a); § 1506.6; 43 C.F.R. §§ 46.235, 46.305, 47.435.

⁸ GAO-15-502 Indian Energy Development, June 2015 at 26.

Thank you for the opportunity to provide the testimony of the Ute Indian Tribe of the Uintah and Ouray Reservation on the inherent problems caused by NEPA's application to development on Indian lands and the barriers it places on development of our lands and resources. It is our hope that these comments are fully considered by the Committee and that positive changes can be made to minimize the unnecessary constraints NEPA places on tribal economic development.

Rep. Grijalva Submissions

BACKCOUNTRY HUNTERS & ANGLERS

April 25, 2018

Hon. ROB BISHOP, *Chairman*,
Hon. RAÚL GRIJALVA, *Ranking Member*,
House Committee on Natural Resources,
1324 Longworth House Office Building,
Washington, DC 20515.

Dear Chairman Bishop and Ranking Member Grijalva:

On behalf of Backcountry Hunters & Anglers (BHA), the sportsmen's voice for our wild public lands, waters and wildlife and the fastest growing organization advocating for quality places to hunt and fish, I want to encourage you to work with us in developing modern solutions that collaboratively straddle the important balance between extractive needs, such as energy development, and land management practices that also uphold bedrock conservation laws and safeguard outdoor traditions like hunting and fishing on our public lands.

The National Environmental Policy Act of 1969 (NEPA), while not perfect, is a vital conservation law that considers impacts to fish and wildlife habitat, hunting and fishing opportunities and other environmental factors before major activities and development projects are implemented on public lands. This regulatory procedure is an important step in planning processes that provides public engagement, solicits input from local stakeholders and gives the public an opportunity to provide comments, creating a transparent dialogue between diverse interests. By focusing on landscape level planning efforts and avoiding conflicts upfront, we can work together to ensure development activities, including resource extraction, can co-exist with fish and wildlife and uphold multiple-use mandates without having one use come at the expense of others like hunting and fishing.

A solution-oriented approach that doesn't waive or exempt important NEPA processes lies in Congressmen Chris Stewart (R-UT) and Scott Tipton's (R-CO) Sage-Grouse and Mule Deer Habitat Conservation and Restoration Act (H.R. 3543). H.R. 3543 allows public land agencies to restore sagebrush habitat more efficiently by streamlining regulatory processes while also complying with existing laws and conservation policies. The bill reforms invasive species treatments, such as the removal of piñon and juniper trees, and facilitates sagebrush restoration, improving habitat conditions for sought-after game species like sage grouse and mule deer that thrive in healthy sagebrush landscapes.

H.R. 3543 is a great example of modernizing land management practices and conserving critical fish and wildlife habitat. It is also a notable example of bipartisan agreement between federal, state, and local governments, the oil and gas industry, and conservation organizations. As discussions about reforming the National Environmental Policy Act progress, BHA is eager to work in partnership with you to advance bipartisan solutions that provide greater certainty to industries such as energy development and outdoor recreation in addition to serving the interests of hunters, anglers and wildlife on public lands.

Sincerely,

JOHN GALE,
Conservation Director.

GREENLATINOS,
THE CITY PROJECT

April 24, 2018

Hon. ROB BISHOP, *Chairman*,
Hon. RAÚL GRIJALVA, *Ranking Member*,
House Committee on Natural Resources,
1324 Longworth House Office Building,
Washington, DC 20515.

Re: The Weaponization of the National Environmental Policy Act and the
Implications of Environmental Lawfare

Dear Chairman Bishop, Ranking Member Grijalva, and Honorable Members of
the Committee:

We appreciate the opportunity to provide written comments for the Committee's
hearing on "The Weaponization of the National Environmental Policy Act and the
Implications of Environmental Lawfare." Please accept these comments for the
hearing's official record.

We reject the premise of the hearing and the misuse of the term "lawfare" as ap-
plied to NEPA.¹ "Broadly defined, 'lawfare' is the manipulation of the legal system
against an enemy with the intent to damage or delegitimize them, waste their time
and resources, or to score a public relations victory." The use of 'lawfare' misstates
the facts and the experience of NEPA as applied for over 40 years.

Republican President Richard M. Nixon signed the National Environmental Policy
Act (NEPA) into law with bipartisan support in 1970. NEPA is effective in providing
the public and public officials with the information we all need to make better
decisions.

*"Thank God for NEPA because there were so many pressures to make a
selection for a technology that might have been forced upon us and that
would have been wrong for the country,"*

—James Watkins, Secretary of Energy under Republican President George H.W.
Bush

NEPA provides a proven bulwark against hasty or wasteful federal decisions by
fostering government transparency and accountability. NEPA ensures federal
decisions are democratic at their core by guaranteeing meaningful public involve-
ment. NEPA has achieved its stated goal of improving the quality of the human
environment by relying on sound science to reduce and mitigate harmful environ-
mental impacts.

We support strengthening the rule of law under NEPA, to enable fair, efficient,
and effective review by the people. We are especially committed to enforcing NEPA
to evaluate impacts of environmental policies and programs on people of color and
low-income people.

NEPA plays a vital role in distributing fairly the benefits and burdens of environ-
mental policies and programs for all. What the environmental justice movement has
demonstrated is that racially identifiable communities are at a greater risk of envi-
ronmental harms, disproportionately lack environmental benefits, pay a larger cost,
and carry a heavier environmental burden than other communities, regardless of
income and class.

Latinos are among the strongest supporters of environmental protection for sev-
eral major reasons, namely, local exposure to pollutants, the effects of climate
change and pollution on migrant farmworkers, and the impact of global warming
on Latin American nations. Nevertheless, Latinos, and other people of color, are
often marginalized by public officials, government agencies, mainstream environ-
mentalists, and the media.² Proper enforcement of NEPA can help address these
environmental injustices.

¹ National Environmental Policy Act, 42 U.S.C. 4321 et seq.

² See generally Samuel Garcia, *Latinos and Climate Change: Opinions, Impacts, and Responses*
(Policy Report GreenLatinos & The City Project 2016), www.cityprojectca.org/blog/archives/43303; Prof. Gerald Torres & Robert Garcia, *Pricing Justice: Carbon Pricing and Environmental Justice* (Policy Report The City Project 2016), www.cityprojectca.org/blog/archives/43641; Ariel Collins & Robert Garcia, *Climate is a civil rights and moral issue as well as a health, economic, and environmental issue* (Policy Report The City Project 2015), www.cityprojectca.org/blog/archives/35499; Environmental Justice Leadership Forum, *Guidance to Incorporate Environ-*

The National Academies of Sciences, Engineering, and Medicine recognizes the importance of enforcing environmental and civil rights laws to promote human health, a healthy environment, and community resilience in the committee report called *Communities in Action: Pathways to Health Equity* (2017). Well-documented threats to healthy communities include environmental exposures to lead, particulate matter, proximity to toxic sites, water contamination, air pollution, and more—all of which are known to increase the incidence of respiratory diseases, various types of cancer, and negative birth outcomes and to decrease life expectancy.

Low-income communities and communities of color have an elevated risk of exposure to environmental hazards and disproportionately lack access to environmental benefits, such as parks and green space. In response to these inequities, the field of environmental justice seeks to achieve the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.³

NEPA and other regulations are not the major cause of delay in infrastructure development and government decision-making.⁴ The Congressional Research Service (CRS) has identified alternative causes of delay including lack of funding that are entirely outside the NEPA process. The U.S. Department of Treasury concluded “a lack of funds is by far the most common challenge to completing” major infrastructure projects.

This Congress has proposed bills that would disregard the role of objective truth and scientific evidence in government decision making, waive NEPA via legislative categorical exclusions, limit the scope of environmental reviews to ignore climate impacts, and reduce government accountability by limiting judicial review. These attacks reflect a misguided ideological bias to eliminate NEPA, the legacy of bipartisan support for NEPA, and the rule of law.

GreenLatinos is a national coalition of Latino environmental and conservation advocates. The City Project’s mission is equal justice, democracy, and livability for all.

We urge this Committee in the strongest possible terms to ensure taxpayer dollars are used to protect our health, our people, and our environment. People of color care about protecting people, biodiversity, places, and values under NEPA through democratic participation and the rule of law.

Very truly yours,

Mark Magaña, President,
GreenLatinos

Robert García, Founding Director,
The City Project

April 24, 2018

Dear Chairman Bishop, Ranking Member Grijalva, and Committee Members:

We, the undersigned 119 law professors, understand that the House Committee on Natural Resources is holding a hearing on April 25, 2018, titled “The Weaponization of the National Environmental Policy Act and the Implications of Environmental Lawfare,” and write to express our views about NEPA and NEPA litigation. Contrary to the premise implied by the title of the hearing, we believe that NEPA continues to serve its important purpose of informing government decisionmakers and the public about the environmental consequences of federal actions. We also believe that litigation under the statute, on the whole, continues to appropriately hold federal agencies accountable for their legal obligations. In this letter,

mental Justice and Civil Rights in State Clean Power Plans, <https://www.cityprojectca.org/blog/archives/41618>.

³National Academies of Sciences, Engineering, and Medicine, Committee Report, *Communities in Action: Pathways to Health Equity* (2017), p. 144. See generally the following pages and authorities cited: S-12, S-14, 1-9, 3-35 to -38, 3-3 to 3-48, 6-7 to -9, 5-72 to -78, 6-13 to -22 (civil rights strategies and equity framework to avoid displacement), 7-2 to -5, 8-15 to -18, Recommendations 3-1, 6-1 and 7.1. The full report and highlight are available at www.nationalacademies.org/promotehealththeequity.

⁴Congressional Review Service (CRS), *Accelerating Highway and Transit Project Delivery: Issues and Options for Congress* (2011), www.aashtojournal.org/Documents/August2011/CRSinfrastructure.pdf; Toni Horst, et al., *40 Proposed U.S. Transportation and Water Infrastructure Projects of Major Economic Significance*, AECOM (2016), www.treasury.gov/connect/blog/Documents/final-infrastructure-report.pdf.

we focus our comments on data about NEPA compliance and litigation, which, in our view, do not support claims that NEPA imposes undue burdens on federal agencies or the private parties seeking regulatory permissions from them.

There is little evidence that litigation under NEPA is out of control or that NEPA processes are unnecessarily protracted. To the contrary, environmental reviews and procedures conducted under NEPA are typically circumscribed and rarely challenged in court. Roughly 99% of the many thousands of federal actions with potentially significant environmental impacts are covered either by “categorical exclusions” (CEs) to NEPA procedures or by “environmental assessments” (EAs), which take days to months, respectively, to complete. By contrast, detailed environmental impact statements (EISs) now consistently number below 200 annually across the entire federal government. The volume of litigation under NEPA is also low: fewer than 100 NEPA cases are filed in district court annually, about half of which involve challenges to EISs. A small fraction of environmental reviews under NEPA therefore either require detailed EISs or are subject to judicial challenges. And, as NEPA programs have matured, federal agencies have become more proficient at identifying the actions that require the highest level of analysis. This is reflected both in the number of EISs prepared nationally, which has been falling, and the increased use of CEs. That the time required to prepare an EIS has increased over the last decade or so also reflects federal agencies’ increasing proficiency with administering the statute; as federal agencies have increased the threshold for preparing an EIS, on average, the magnitude and complexity of the environmental impacts associated with the federal actions covered by EISs have increased proportionately.

Moreover, neither the number of NEPA cases filed annually nor their outcomes suggests that NEPA litigation is out of step with litigation in other areas of administrative law, and NEPA litigation is not unusually protracted as compared to other administrative law litigation in federal courts. Evidence also indicates that NEPA litigation is grounded in legitimate claims, rather than being used principally as a strategic device to delay projects opposed by litigants without regard to likely success on the merits. This is reflected in the observation that environmental organizations prevail in NEPA litigation at rates that equal or substantially exceed success rates in administrative law challenges generally.

This letter addresses the following key points:

- A small percentage (1%) of federal actions require an environmental impact statement; most are covered by categorical exclusions or environmental assessments.
- The small subset of actions that require an EIS represent significant decisions, which warrant being subject to NEPA analyses and public review processes.
- While EISs take several years to complete, the examples raised by critics of NEPA are often extreme outliers that are not representative of NEPA processes generally.
- Neither the number of NEPA cases filed annually, which is low and consistent across time, nor the outcomes of these cases suggest that NEPA litigation is being abused or used for the sole purpose of strategic delay.
- For most federal agencies, a NEPA lawsuit is a rare event and claims that NEPA poses a significant burden have little basis in fact.

We discuss each of these points in further detail below. In the aggregate, they demonstrate that criticisms of NEPA are not supported by the available evidence on environmental review processes and litigation. While opponents of NEPA may identify isolated cases of particularly prolonged NEPA review or litigation, data do not support claims that systemic problems exist requiring legislative attention.

I. The Role of EISs

As we will discuss, available data indicate that federal agencies require preparation of an EIS for a small fraction of federal actions and that these EISs are disproportionately prepared by a few agencies. In other words, most agencies implement NEPA with relative ease and most federal projects are reviewed quickly and at low cost.

The vast majority of agency actions subject to NEPA review do not involve preparation of an EIS. The non-partisan Government Accountability Office (GAO)

estimates that roughly 94% of NEPA decisions fall under CEs,¹ about 5% are covered by EAs, and less than 1% are reviewed under EISs.² If one includes draft, supplemental, and final NEPA documents government-wide, this translates to the preparation of an average of roughly 137,750 CEs, 6,820 EAs, and about 435 EISs annually for the period 2008 through 2015.³ For the period 2008 through 2015, EPA data reveal that the actual number of EISs issued each year is consistent with the GAO's estimate, averaging 224 draft and 211 final EISs per year, but the number of final EISs declined over this period from a high of 277 in 2008 to about 170 by 2016.⁴

A relatively small number of federal agencies account for most of the environmental reviews. Only five federal agencies issue more than 10 final EISs per year and most issue fewer than 5 if they issue any at all.⁵ According to EPA and CEQ data for the period 1998 through 2015, four federal agencies issued more than 50% of the EISs published nationally: on average for this period the U.S. Forest Service (USFS) accounted for 24%, the Bureau of Land Management (BLM) accounted for 8%, the U.S. Army Corps of Engineers (USACE) accounted for 10%, and the Federal Highway Administration (FHWA) accounted for 12%.⁶ The EPA data also reveal that thirty-six other federal agencies issued at least one EIS per year over the period 2012 through 2015, with the National Park Service (NPS) and the U.S. Fish and Wildlife Service (FWS) accounting for another 10% of the EISs issued, and the Federal Energy Regulatory Commission (FERC) rising in prominence starting in 2015 when it began issuing roughly the same number of EISs each year as the FWS (roughly 7 annually).⁷

Cost and timing data for NEPA analyses are difficult to obtain, but available evidence does not support the view that NEPA systematically imposes unreasonable burdens on federal agencies or regulated entities.⁸ In 2003, a NEPA task force report "estimated that an EIS typically cost [sic] from \$250,000 to \$2 million," whereas "an EA typically costs from \$5,000 to \$200,000."⁹ The National Association of Environmental Professionals (NAEP) collects data on the time it takes for EISs to be completed. In a report covering the time period 2000 through 2012, it found that the average preparation time was 4.6 years in 2012 and that EIS preparation times

¹The GAO noted, however, that "CEs are likely underrepresented in their totals because agency systems do not track certain categories of CEs considered 'routine' activities." U.S. Government Accountability Office, GAO-14-370, *National Environmental Policy Act: Little Information Exists on NEPA Analyses* 8-9 (April 2014).

²*Id.* at 8. These estimates are imperfect, because federal agencies typically do not record the number of CEs or EAs they issue, despite the fact that most agency compliance with NEPA is covered by them. *Id.* With respect to particular agencies, the GAO found, for example, "Department of Energy (DOE) reported that 95 percent of its 9,060 NEPA analyses from fiscal year 2008 to fiscal year 2012 were CEs, 2.6 percent were EAs, and 2.4 percent were EISs or supplemental analyses." *Id.* Similarly, the FHWA also reported that 96% of FHWA-approved projects in 2009 "involve[d] no significant environmental impacts and, hence, require limited documentation, analysis, or review under NEPA". *Id.*; cf. Linda Luther, Cong. Research Serv., R42479, *The Role of the Environmental Review Process in Federally Funded Highway Projects: Background and Issues for Congress* 5 (2012).

³GAO, *supra* note 1, at 9 (the calculation is based on an extrapolation from the percentages for each NEPA process using the number of EISs issued by federal agencies in 2011). For further comparison, CEQ was required to collect and issue a report on NEPA compliance in 2009. See American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1609(c), 123 Stat. 115, 304 (2009); Nat'l Env'tl. Policy Act, American Recovery and Reinvestment Act of 2009 & NEPA, https://ceq.doe.gov/ceq-reports/recovery_act_reports.html.

⁴EPA data were downloaded from the EIS Database for the period January 1, 2012 through December 31, 2015, which is available at: <https://cdxnodengn.epa.gov/cdx-enepa-public/action/eis/search>. See also NAEP, Annual NEPA Report 2016 of the National Environmental Policy Act (NEPA) Practice 4-5 (2017). These results are roughly consistent with other work finding that EPA reported 253 (standard deviation of twenty-six) EISs annually during the period 1987 through 2006. Piet deWitt & Carole A. deWitt, *How Long Does It Take to Prepare an Environmental Impact Statement*, 10 Env'tl. Prac. 164, 171 (2008).

⁵The five agencies are USFS (~40/year), BLM (~20/year), USACE (~15/year), FHWA (~13/year), and NPS (~10/year).

⁶GAO, *supra* note 1, at 11; EPA EIS database, *supra* note 4.

⁷The U.S. Navy, Nuclear Regulatory Commission, Federal Transit Administration, Bureau of Reclamation, National Oceanic & Atmospheric Administration, and Department of Energy each accounted for between 2% and 3% of the EISs issued from 2012 through 2015 according to the EPA data. EPA EIS database, *supra* note 4.

⁸GAO, *supra* note 1, at 12.

⁹*Id.* at 13-14. DOE collects some of the most detailed information on costs. For the period 2003 through 2012, it found that the median cost of an EIS was \$1.4 million and the average \$6.6 million, with costs ranging from a low of \$60,000 to a high of \$85 million; it also estimated that the median cost of an EA is \$65,000, with a range from \$3,000 to \$1.2 million. *Id.* at 13.

had increased on average at a rate of thirty-four days per year.¹⁰ The average preparation time for an EIS rose by a further 11% to 5.1 years by 2016.¹¹ In another survey covering twenty years (1987–2006), the average time for agencies to prepare an EIS was 3.4 years, with a standard deviation of 2.7 years.¹² This study also found significant differences among federal agencies, with the FHWA and USACE having mean preparation times that were 1.9 and 1.26 times longer, respectively, than the average for other federal agencies.¹³ Differences therefore exist in preparation times for EISs both within and among federal agencies.¹⁴

The modest increase observed in the average time required to complete an EIS has occurred coincident with a 39% decrease in the number of EISs prepared. These opposite trends suggest that agencies have increasingly relied upon EAs to address projects that are less-controversial or have fewer impacts, and that the remaining pool of projects reviewed under an EIS are more complicated and require comparatively more analysis. The drop in the number of EISs completed in a year is consistent with the shift away from EISs.¹⁵ Overall, the data do not support a conclusion that NEPA compliance has, on average, become significantly more burdensome.

II. NEPA Litigation

Data related to NEPA litigation, like that on NEPA compliance, do not evidence an increasing or unreasonable delay for federal projects. In particular, plaintiffs, on average, are more likely to succeed in NEPA litigation than in other administrative law litigation, which is inconsistent with the claim that plaintiffs use NEPA strategically to delay or impede projects without evaluating the soundness of their claims.

A recent study examined NEPA litigation over a 15-year period encompassing the George W. Bush and Barack Obama Administrations.¹⁶ Just as completion of EISs is dominated by a few agencies, so too is NEPA litigation. About three-quarters of district and circuit court cases with NEPA claims were filed against five agencies, each of which either manages federal lands or has principal authority over protecting natural resources.¹⁷ Two federal agencies, the USFS and BLM, accounted for more than 50% of the district court cases. Notably absent from this list are agencies that fund or permit major infrastructure projects, such as the FHWA, and agencies with authority over major federal facilities, such as the Department of Defense (DOD) and the DOE.

¹⁰ NAEP, Annual NEPA Report 2012 of the National Environmental Policy Act (NEPA) Practice 11–14 (2013), https://ceq.doe.gov/docs/get-involved/NAEP_2012_NEPA_Annual_Report.pdf. Less information is available on EAs. According to a 2013 DOE report, the average completion time for an EA issued by DOE was thirteen months; by contrast, the average for the USFS was about nineteen months in 2012. GAO, *supra* note 7, at 15–16. Even less information is collected on CEs, but rough estimates exist that range from typical times of 1–2 days within DOE to 177 days within the USFS. *Id.* at 16.

¹¹ NAEP, *supra* note 3, at 12–15.

¹² Piet deWitt & Carole A. deWitt, *How Long Does It Take to Prepare an Environmental Impact Statement*, 10 *Env'tl. Prac.* 164, 167 (2008).

¹³ The average for other federal agencies (excluding the USFS which was slightly lower) was 2.9 years (standard deviation of two years), whereas the average for the FHWA was 5.5 years (standard deviation of 3.2 years) and the average for USACE was 3.7 years (standard deviation of 2.4 years). *Id.*

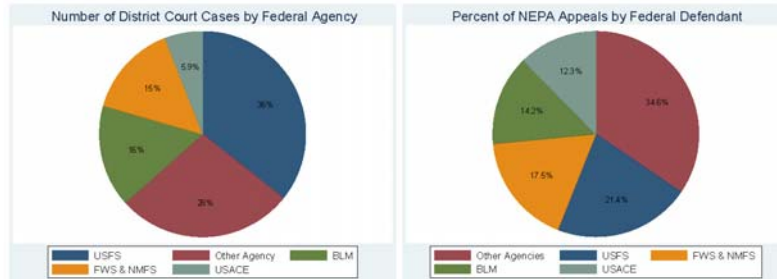
¹⁴ The FHWA is an outlier among federal agencies (completing less than 10% of its EISs in two years or less), while the USFS managed to prepare more than half of its EISs in two years or less. *Id.* at 169.

¹⁵ NAEP, *supra* note 3, at 12–15.

¹⁶ David E. Adelman & Robert L. Glicksman, *Presidential and Judicial Politics in Environmental Litigation*, 50 *Ariz. St. L.J.* 1 (forthcoming 2018). The study centers on two samples consisting of 498 district court cases and 334 circuit court cases but also includes auto-coded analysis of the full populations of 1,572 district court and 656 circuit court cases litigated between 2001 and 2015.

¹⁷ The five federal agencies are the USFS, BLM, FWS, National Marine Fisheries Service (NMFS), and USACE.

Figure 1: Number of NEPA Cases by Federal Defendant 2001–15



While this pattern is driven in part by the large geographic scale and environmental sensitivity of the public lands each agency manages, along with the large share of EISs prepared by those agencies, the decisions of these agencies still appear more likely to be the subject of NEPA litigation than decisions by other agencies. Many federal agencies routinely undertake or oversee actions with large environmental impacts and yet are rarely subject to lawsuits, notably agencies such as DOE, the Department of Defense, and the FHWA.¹⁸ Table 1 below provides a measure of the observed imbalance by comparing the percentage of the total number of EISs issued nationally by agencies against the percentage of the total number of NEPA suits with EIS-related claims filed against them. Table 1 below shows that for all but the BLM, the relative litigation rates were much higher for the land management and natural resource conservation agencies. Conversely, the litigation rates for agencies that oversee major infrastructure projects were substantially below average for all but FERC, which was essentially at the mean for agencies completing a significant number of EISs. Accordingly, in both absolute and relative terms, NEPA compliance and litigation are focused on federal land management and protection of endangered species, as opposed to major construction or infrastructure projects.

The focus of NEPA litigation on a small subset of federal agencies is mirrored in the geographic distribution of cases across federal circuits. Most federal land is located in western states, suggesting that on this basis alone one would expect cases to be filed disproportionately in the Ninth and Tenth Circuits, which together encompass 99% of BLM land, 85% of USFS land, and 91% of NPS land.¹⁹ Two-thirds of the district court cases were filed in either the Ninth or Tenth Circuits and 12% were filed in the D.C. Circuit.²⁰ The distribution of appeals across the federal circuits largely matches the district court filings.²¹ At the state level, two-thirds of the cases were filed in just ten states,²² and just four states (California, Montana, Oregon, Arizona) and the District of Columbia accounted for half of the cases. Only two states of the top ten, Florida and New York, were eastern states and each has distinctive characteristics—Florida has many endangered species and wetlands (including the Everglades),²³ and New York has significant wetlands. The D.C. Circuit is unique because plaintiffs can use it as an alternative venue to the circuit in which a federal action is located because most federal agencies are based in D.C.

¹⁸Only the FHWA accounted for more than 5% of the district court cases filed, and it accounted for just about 6% if cases involving other agencies within DOT are included.

¹⁹The percentages for each circuit are as follows: the Ninth Circuit encompasses 72% of BLM land, 64% of USFS land, and 84% of NPS land; the Tenth Circuit encompasses 27% of BLM land, 22% of USFS land, and 7% of NPS land. Carol Hardy Vincent et. al., Cong. Research Serv., R42346, Federal Land Ownership: Overview and Data 9–11, 21 (2017), <https://fas.org/sgp/crs/misc/R42346.pdf>.

²⁰The distribution of cases across federal circuits was similar in our sample study: Ninth Circuit—51%, Other Circuits—27%, D.C. Circuit—12%; Sixth Circuit—3%; and the Tenth Circuit—7%.

²¹The appeal rate in the Tenth Circuit was almost twice that of other circuits, as it accounted for 12% of the appeals but just 6.7% of the district court cases. Statistically, the small absolute number of appeals in the Tenth Circuit, just thirty-nine in total, may foreclose ruling out random variation.

²²The states are: Arizona, California, Colorado, District of Columbia, Florida, Idaho, Montana, New York, Oregon, and Washington. Only Colorado, Florida, and New York are outside the Ninth or D.C. Circuits.

²³Florida also ranks 15th nationally with regard to the percentage (13.0) of federal land in the state. See Federal Land Ownership: Overview and Data, *supra* note 19, at 7.

Table 1: Comparison by Agency of Percent EISs vs. Percent EISs Litigated²⁴

Agency	EPA-EIS	Litigation Rates	Multiple
BLM	11.6	11.44	1.0
DOD	5.4	3.00	0.6
DOE	2.7	1.91	0.7
FERC	3.3	3.54	1.1
FHWA	8.2	2.18	0.3
FWS	3.9	7.08	1.8
NMFS	1.4	7.36	5.3
Other Agencies	32.1	28.34	0.9
USACE	9.6	4.36	0.5
USFS	21.7	30.79	1.4

Little evidence exists that environmental plaintiffs,²⁵ whether national or local organizations, are using NEPA for purely strategic reasons divorced from the strength of their legal claims to hold up government action. If environmental plaintiffs were filing cases without regard to the merits of their claims, we would expect them to prevail less often than other plaintiffs. Yet, they won substantially more often than other plaintiffs filing cases under NEPA at the district court level (35% versus 16%, respectively) and on appeal (27% versus 14%). In the broader context of judicial review, the success rates of environmental organizations in NEPA lawsuits were similar to the averages for challenges to agency action in a wide range of empirical studies;²⁶ moreover, they were substantially higher than the global averages during the George W. Bush Administration.²⁷ These findings, along with the roughly proportional share of appeals by environmental organizations (i.e., rates comparable to other plaintiffs), provide strong evidence that NEPA litigation is grounded on legitimate claims. In sum, neither the number of cases filed annually nor their outcomes suggests that NEPA litigation is being abused or used for the sole purpose of strategic delay.

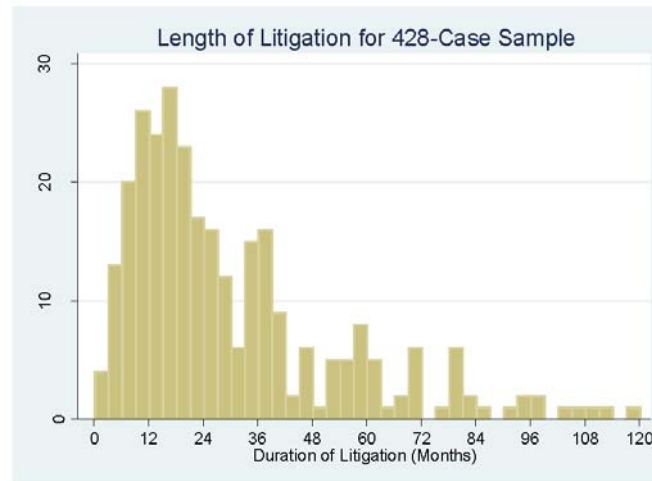
²⁴The EIS data are taken from the EPA EIS database that covers 2012–2016. *Environmental Impact Statement (EIS) Database*, EPA, <https://cdxnodengn.epa.gov/cdx-enepa-public/action/eis/search> (last visited Jan. 26, 2018).

²⁵Plaintiffs were divided into five broad classes: local environmental organizations; national environmental organizations; other non-governmental organizations; businesses and business associations; and cities, counties, states, and tribes. “National environmental organizations” were defined narrowly to include a small number of high-profile environmental organizations (e.g., Sierra Club, Natural Resources Defense Council, National Wildlife Federation, Center for Biological Diversity) to identify the organizations that litigated a large share of NEPA cases.

²⁶See Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. Chi. L. Rev. 761, 767–68 (2008) (reporting data on administrative review cases involving EPA indicating that agencies prevailed on average 72% of administrative challenges on appeal); Richard J. Pierce & Joshua Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 Admin. L. Rev. 515, 515 (2011) (observing that “[c]ourts at all levels of the federal judiciary uphold agency actions in about 70% of cases” irrespective of the standard of review that they apply); Richard J. Pierce, *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 Admin. L. Rev. 77, 84–85 (2011) (synthesizing the results of numerous empirical studies of judicial review and finding that agencies prevail in 64%–81% of the cases at the circuit level). A recent study finds that success rates in adjudicated cases in federal courts fell from 70% in 1985 to 33% in 2009. Alexandra D. Lahav & Peter Siegelman, *The Curious Incident of the Falling Win Rate 1*, (July 7, 2017) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2993423.

²⁷During the Bush Administration environmental organizations prevailed in 45% and other plaintiffs in 20% of the cases; during the Obama Administration, they prevailed in 24% and 13%, respectively, of the cases. On appeal during the Bush Administration, environmental organizations prevailed in 35% of the cases and other plaintiffs prevailed in 16%, whereas during the Obama Administration, success rates converged to 17% and 15%, respectively.

Figure 2: Duration of NEPA Litigation in District Courts



By the standards of federal administrative litigation,²⁸ the duration of NEPA litigation is roughly comparable to or shorter than that of administrative law cases generally (see Figure 2). The median duration of a NEPA case was less than two years (twenty-three months), and 75% of the cases were resolved within 3.2 years (thirty-nine months). Moreover, for the subset of cases in which the federal government prevailed, the median duration was just 1.5 years and 75% of the cases were resolved within three years (thirty-six months).²⁹ The existing data therefore provide no basis for claims that NEPA litigation is unduly protracted.

III. Conclusion

Evidence about the implementation of NEPA and NEPA litigation negates the common criticisms of the statute. The vast majority of agencies' decisions that have the potential to significantly impact the environment require only perfunctory review under CEAs or relatively streamlined reviews under EAs; in comparison, the number of EISs prepared is modest and has been gradually declining over the last decade.³⁰ The number of cases filed under NEPA has remained relatively constant, with about 100 cases filed in district courts annually (about 35% of which settle) and roughly twenty-five appeals. Given that the number of federal actions potentially subject to NEPA is roughly 100,000 or so annually,³¹ litigation rates are

²⁸See Mark A. Fellows & Roger S. Haydock, *Federal Court Special Masters: A Vital Resource in the Era of Complex Litigation*, 31 Wm. Mitchell L. Rev. 1269, 1289 (2005) (finding that the average duration of a federal civil case from filing to trial increased from 19.5 to 22.5 months between 1998 and 2003); Jessica Kier, *Raising the Bar: How Will the New federal Rules of Civil Procedure Affect Your Required Level of Competency?*, 39 J. Legal Prof. 103, 105 (2014) (reporting that the median duration for securities class-action lawsuits was three and a half years); Kathryn Moss et al., *Prevalence and Outcomes of ADA Employment Discrimination Claims in the Federal Courts*, 29 Mental & Physical Disability L. Rep. 303, 307 (2005) ("Between 1990 and 1998, the percentage of general federal civil rights cases resolved within two years increased from 82 percent to 88 percent . . .").

²⁹For cases in which the federal government wins, 50% of the cases are resolved within about 1.5 years; 75% resolved within three years; 90% of the cases are resolved within five years. For cases in which the plaintiff prevails on at least one claim, 50% of the cases are resolved within 2.5 years; 75% resolved within about 4.3 years; and 90% of the cases are resolved within 6.2 years.

³⁰See Bradley C. Karkkainen, *Whither NEPA?*, 12 N.Y.U. Envtl. L.J. 333, 348 (2004) (characterizing the number of federal actions each year that trigger EIS preparation duties "a vanishingly small number given the scale and scope of federal operations").

³¹Federal agencies annually conduct hundreds of EISs, tens of thousands of abbreviated environmental assessments, and hundreds of thousands of routine determinations that environmental impacts of a proposed action are insignificant. See *NEPA Litigation: CEQ Reports*, Council Envtl. Quality, <https://ceq.doe.gov/ceq-reports/litigation.html> (last visited Jan. 24, 2018).

exceedingly low; even among actions requiring EISs, which pose the greatest potential threats to the environment, on average just 20% are challenged.³²

These numbers represent national averages and refute claims that NEPA systematically causes chronic delays and promotes obstructionist litigation. The national statistics do, however, obscure the variable nature of NEPA litigation. For most federal agencies, a NEPA lawsuit is a rare event and claims that NEPA poses a significant burden to them have little basis in fact. A subset of federal land and natural resource management agencies accounts for three-quarters of the NEPA cases filed. Even for these agencies, though, the majority of the EISs they prepare are not the subject of litigation; the USFS is most likely to face NEPA litigation but only about 25% of EISs issued by the USFS are challenged. Similarly, for the FWS and NMFS, while the litigation rates are higher, the total number of EISs is low (averaging just eight and three EISs per year, respectively). Thus, in absolute terms, the burden from NEPA for either of these agencies is not likely to be significant.

The low frequency and implied selectivity of NEPA litigation are reflected in the relative success of environmental plaintiffs. Environmental organizations prevailed at consistently higher rates than other plaintiffs filing NEPA actions, and their success in court was comparable to or substantially exceeded that of plaintiffs generally in administrative law challenges. By these benchmarks, the merits of NEPA challenges filed by environmental plaintiffs are inconsistent with claims that NEPA suits are routinely filed merely to hold up agency action and lack legitimate legal grounds. The high success rates of environmental plaintiffs, who prevailed in about 45% of their cases during the George W. Bush Administration, is further evidence countering the charge that environmentalists used NEPA for purely strategic objectives.

In this letter, we have examined the available information on implementation of NEPA and litigation arising out of various agencies' NEPA compliance. The data refute critics' claims that a systemic crisis exists with respect to either NEPA implementation or litigation. Instead, they reveal that federal agencies in the vast majority of covered actions engage in streamlined environmental reviews relying on either a CE or EA, and that NEPA litigation is rare. In this light, we do not believe that there are grounds for claims that NEPA has been "weaponized" or that environmental organizations are misusing the statute.

Sincerely,

(All of the following are signatories in their personal capacity only. Institutional affiliations are included for identification purposes only.)

[The complete list of 119 signatories is part of the hearing record and has been retained in the Committee's official files.]

April 25, 2018

Hon. ROB BISHOP, *Chairman*,
Hon. RAÚL GRIJALVA, *Ranking Member*,
House Committee on Natural Resources,
1324 Longworth House Office Building,
Washington, DC 20515.

Dear Chairman Bishop and Ranking Member Grijalva:

We appreciate the opportunity to provide written comments for the Committee's April 25, 2018 hearing titled "The Weaponization of the National Environmental Policy Act and the Implications of Environmental Lawfare." On behalf of the undersigned organizations and our millions of members and supporters, please accept these comments for the hearing's official record.

As an initial matter, we note that the title of the hearing indicates the majority's likely unwillingness to pursue consideration of the National Environmental Policy Act (NEPA) in a bipartisan manner or to even consider evidence contrary to predetermined conclusions. The National Environmental Policy Act (NEPA) is a law aimed at driving responsible decisions, informed by the best available evidence and the input of a diverse number of stakeholders. Unfortunately, the hearing title

³² See J. Clarence Davies & Jan Mazurek, *Pollution Control in the United States: Evaluating the System* 163 (2014) ("The percentage of EISs challenged in court has remained relatively stable, . . . fluctuating between 15 and 20 percent of all EISs filed.").

strikes an ironic note, suggesting that some members of the committee may aim to make significant changes to the law without full consideration of relevant facts or diverse voices.

This evidence of open hostility to environmental review, government accountability, and public input under NEPA is manifest not only in the title of this hearing but also in legislative attacks from Congress. Over the last several years, hundreds of pieces of legislation have been introduced that would weaken NEPA or waive it entirely, but without any evidence of a problem with the law itself. The 115th Congress alone has been the source of over 60 such proposals that would waive NEPA via legislative categorical exclusions, limit the scope of environmental reviews to specifically ignore climate impacts, or even reduce government accountability to the public it serves by placing limitations on judicial review. The volume of these attacks evidences a disturbing ideological effort focused on eliminating, not improving, this law.

All of these bills are based on the persistent but demonstrably false premise that NEPA and other regulations are the major cause of delay in infrastructure development and government decision-making. This theory has been comprehensively examined and thoroughly rebuffed by administrations of both parties through numerous studies, including ones conducted by the Congressional Research Service (CRS) and the U.S. Department of the Treasury. The CRS has repeatedly concluded that NEPA is not a primary or major cause of delay in project development. Rather, CRS identified causes entirely outside the NEPA process, such as lack of funding.¹ In a report released in December of 2016, the Treasury Department similarly concluded that “a lack of funds is by far the most common challenge to completing” major transportation infrastructure projects.²

The often repeated and easily debunked allegation that NEPA is simply a tool for frivolous litigation, standing in the way of infrastructure development, or that it prevents management of public resources is an pernicious canard, threatening the foundation of informed, democratic decision-making by the federal government.

NEPA is rightfully referred to as the “Magna Carta” of environmental laws. Like that famous charter, NEPA enshrines fundamental values into government decision-making which is why it has been imitated by 160 countries around the world, making it one of the most widely imitated U.S. laws. NEPA has been a proven bulwark against hasty or wasteful federal decisions by fostering government transparency and accountability. It has ensured that federal decisions guarantee meaningful public involvement. It has achieved its stated goal to improve the quality of the human environment by relying on sound science to reduce and mitigate harmful environmental impacts and on judicial accountability when those impacts are ignored.

As to lawsuits, the White House Council on Environmental Quality (CEQ) has made available a litigation survey of cases filed under NEPA between the years 2001 and 2013. During that period, of the nearly 50,000 actions subject to NEPA annually, only 0.2% had a case filed against the agency. Overwhelmingly, the clear majority of actions subject to NEPA go unchallenged.³ But the ability to challenge NEPA violations is essential to accountability.

¹ Congressional Review Service (CRS), *Accelerating Highway and Transit Project Delivery: Issues and Options for Congress* (Aug. 3, 2011), available at <http://www.aashtojournal.org/Documents/August2011/CRSinfrastructure.pdf>.

² Toni Horst, et al., *40 Proposed U.S. Transportation and Water Infrastructure Projects of Major Economic Significance*. AECOM, (2016). <https://www.treasury.gov/connect/blog/Documents/final-infrastructure-report.pdf> (last accessed March 20, 2016).

³ For example, the Forest Service—frequently an agency called before this Committee for testimony on this topic—recently disclosed that less than 4% of its land management decisions are challenged in court, and that the agency wins about 70% of such lawsuits. The agency itself has concluded that litigation is not a barrier to effective land management, but rather shortfalls in funding, staffing, and training result in delays in project development and implementation. See generally, <https://vimeo.com/237902205>.

Citizen enforcement ensures that federal agencies comply with the law and fulfill their duty to disclose impacts and seek public input on how to improve decisions affecting local communities. Curtailing the ability of local and state governments, citizens, public interest groups, businesses and tribes to bring lawsuits against federal agencies for ignoring responsibilities under NEPA, is not in the public interest. Below are just a few examples of the importance of litigation under NEPA and how it has ensured the actual impacts of decisions are disclosed.

Public Health—*Sierra Club v. Strock*, 495 F. Supp. 2d 1188, 37 ELR 20188 (S.D. Fla. 2007)—At times, it is through litigation under NEPA that critical information that should have been disclosed to the public is revealed. For example, court proceedings in a case brought under NEPA revealed that the Army Corp of Engineers had permitted mining activities that resulted in benzene contamination to the Biscayne Aquifer, which supplies drinking water to Miami Dade County. As a result of this public health threat, costs of improving the drinking water plant were estimated to be up to \$188 million dollars.

Environmental Justice—*St. Paul Branch of NAACP v. U.S. DOT*, 764 F. Supp. 2d 1092 (D. Minn. 2011)—NEPA plays a critical role in ensuring that agencies consider the impacts of federal decisions on low-income communities and communities of color. In 1960, over 600 African-American homes and dozens of businesses were bulldozed to make way for the I-94 freeway. When St. Paul released its plans to construct a light rail line connecting the city to downtown Minneapolis 50 years later, the National Association for the Advancement of Colored People (NAACP) filed suit against the U.S. Department of Transportation (DOT) and St Paul's Metropolitan Council for failing to analyze the short-term impacts of a light rail project on local businesses surrounding the proposed route and adjoining stations. The court concluded that DOT's final environmental impact statement (EIS) was deficient and did not consider the project's economic impacts on local businesses. Consequently, DOT was compelled to produce a supplemental EIS and used the NEPA process to engage with the local community at a series of town hall meetings designed to consider alternatives to mitigate the effects of construction on local small businesses. As a result, Metropolitan Council, City of St. Paul, City of Minneapolis, Metro Transit (the regional transit authority), and the contractor committed nearly \$15 million to help small, local businesses in the corridor cope with the impacts of construction.

Climate Change—*Western Organization of Resource Councils, et al. v. BLM*, 2018 WL 1475470, at *1 (D. Mont. Mar. 26, 2018). NEPA is a money saving and safety tool that ensures the federal government assesses both the impacts of federal decisions on climate change as well as the impacts of climate change on federal projects. Just last month, on March 26, 2018, a federal district judge ruled that the Bureau of Land Management (BLM) violated the law when it made 80 billion tons of coal available for leasing and opened-up more than 8 million acres for oil and gas development in the Powder River Basin without first assessing the environmental risks or considering any alternatives under NEPA. The court agreed that the BLM was in violation of NEPA when it refused to consider alternatives that would reduce the amount of coal available. The BLM also failed to use best available science or adequately analyze the impacts of burning coal, oil and gas, and of methane emissions. This decision under NEPA demonstrates the critical role the law plays in preparing the U.S. for the fundamental environmental challenge of the 21st century, climate change.

These are just a small sample of the countless ways NEPA litigation helps to protect communities, economies, taxpayers and the environment.

Thank you for the opportunity to comment on today's hearing. Our organizations welcome a reasoned discussion aimed at improving and strengthening this important tool of public accountability to increase transparency, better facilitate public input, improve project funding, and reduce the environmental and social impacts of government decisions. We're hopeful that we can all agree that NEPA provides an ongoing opportunity to improve decision-making in the public interest and that we can move forward with the same bipartisan, fact-based discussions that led Congress to overwhelmingly pass NEPA into law fifty years ago.

Sincerely,

American Bird Conservancy	Hip Hop Caucus
American Rivers	Information Network for Responsible Mining
Bold Alliance	Klamath Siskiyou Wildlands Center
Center for Biological Diversity	The Lands Council
Citizens Against LNG	Los Padres ForestWatch
Center for Food Safety	National Parks Conservation Assoc.
Citizens for Renewables	Natural Resources Defense Council
Citizens for Renewables	Oregon Physicians for Social Responsibility
Clean Water Action	Rogue Climate
Defenders of Wildlife	Rogue Riverkeeper
Earthjustice	San Juan Citizens Alliance
Earthworks	Southern Environmental Law Center
Endangered Species Coalition	WE ACT for Environmental Justice
Friends of the Earth	Western Environmental Law Center
Friends of the Sonoran Desert	Western Watersheds Project
GreenLatinos	The Wilderness Society

LABOR COUNCIL FOR LATIN AMERICAN ADVANCEMENT,
WASHINGTON, DC

March 13, 2018

Dear Member of Congress,

On behalf of the Labor Council for Latin American Advancement (LCLAA), home of the Latino labor movement, we write to strongly oppose any and all attacks on the National Environmental Policy Act (NEPA). NEPA provides our communities a voice in some of the most consequential government decisions, impacting where we work, how we work, and even the rights and safeguards we have on the job. As Latino workers, we play a major role in building and maintaining our nation's transportation and energy infrastructure, the same infrastructure that allows our country to prosper. In many instances, Latino workers and working families bear the brunt of federal projects, making our communities most vulnerable to rushed or ill-planned decisions. An attack on NEPA is an attack on Latino priorities and our voice, in particular.

We represent the interests of over 2 million labor unionists, with 50 chapters across the United States. Our members include some of the most prominent unions in the country, including the United Automobile Workers (UAW), the United Steel Workers (USW), the American Federation of State, County and Municipal Employees (AFSCME), the Amalgamated Transit Union (ATU), the Service Employees International Union (SEIU), and the Office and Professional Employees

International Union (OPEIU) amongst many others. We recognize that our country is in dire need of job-creating infrastructure investment but that investment must be used in ways that serve and respond to the needs of the American public. This can only happen through a strong and well thought out NEPA process.

NEPA provides an important voice for Latino workers and working families as we tend to be among the most impacted by federal projects. Latino workers account for over 43% of ground, maintenance and construction workers and up to 75% of agricultural laborers. Our families live, breathe, learn and play in communities next to federally funded highways, incinerators, power plants, pipelines, and toxic waste sites. How these projects are built and how they are run dictate the quality of our health and safety as workers within those facilities as well as the health of our families who live near them. We need a say in how these projects are developed and NEPA provides it.

We consistently use NEPA's public disclosure mandate to learn about how projects are developed and how they will impact our families. We use NEPA's public comment opportunities to fight against worker exploitation and for safer and healthier work places. We also use it to improve the projects with our trade and local expertise. Overall, we use NEPA to make projects better; to make jobs better and to keep our communities safe.

Although NEPA has historically been used to address environmental priorities, it is also a tool we use to address related but independent issues that impact labor, immigrant, and human rights. For example, when a power plant is being developed, we use the NEPA process to address workers' safety; when an immigration detention center is planned, we use it to address the lack of healthcare for immigrant detainees; and when the administration wants to militarize the border with a wall, we use it to show how pointless and hateful the idea is. NEPA is an environmental protection statute but it is also a civic engagement one that we cannot afford to lose.

We are concerned by the increasing volume of attacks on this critical law. In each of the last three Congresses, we have seen over 160 bills that undermine NEPA by shortening public comment periods and statutes of limitation, establishing arbitrary deadlines for environmental review, limiting the consideration of better alternatives or waiving the law altogether. All in all, these harmful measures give industry a green light to recklessly build projects without addressing or even considering how Latino workers, their families, and countless communities of color will be impacted or disenfranchised in the process. We ask that you protect and recognize our right to meaningfully participate in the national infrastructure development process by defending NEPA and all the safeguards it guarantees.

Therefore, as the home of the Latino labor movement, we urge you to oppose any efforts that threaten to undermine our voice in government decisions. We, the workers who contribute so much everyday to building and maintaining our national infrastructure urge you to protect our voice in government. Protect NEPA!

Sincerely,

Hector Sanchez,
Executive Director

Milton Rosado,
LCLAA National President

Eddie Rosario,
LCLAA New York City Chapter
President

Carlos Pelayo,
LCLAA San Diego/Imperial Counties
Chapter President

Desiree Rojas,
LCLAA Sacramento Chapter
President

Casildo Cuevas,
LCLAA Aurora Chapter Member

Jose Alcala,
LCLAA Chicago Chapter

David Diaz,
LCLAA South Florida Vice President

Victor Sanchez,
LCLAA Central Florida Chapter
President

Rose Mary Klein,
LCLAA Oakland County Chapter

Maria Starr-Van Core,
LCLAA Greater Lansing Area
Chapter President

Faviola Armendariz,
LCLAA Denver Area Chapter
Member

Jose Rosado,
LCLAA Puget Sound Chapter
President

Erica Puentes,
LCLAA DC, MD & V A Chapter
Member

Maryann Galicia,
LCLAA Milwaukee Chapter Vice
President

Lyris Medrano,
LCLAA Milwaukee Chapter Member

Lenka Mendoza,
LCLAA DC, MD & VA Chapter
Member

Emma Grayeb,
LCLAA DC, MD & VA Chapter
Member

Jessica Tamayo,
LCLAA DC, MD & VA Chapter
Member

MOVING FORWARD NETWORK

April 24, 2018

Hon. RAÚL GRIJALVA,
U.S. House of Representatives,
Washington, DC 20515.

Dear Congressman Grijalva,

Thank you for the opportunity to provide comments on the importance of preserving the National Environmental Policy Act. These comments are submitted on behalf of the Moving Forward Network.

The Moving Forward Network is a national coalition of over 50 member organizations including community-based groups, environmental Justice advocates, national environmental organizations, and academic institutions, in over 20 major U.S. cities. We represent over two million members, and are committed to advancing environmental and climate justice.

For decades, environmental justice communities have relied on policies such as the National Environmental Policy Act (NEPA) to protect the environment, health, and their communities. NEPA has provided critical tools for local communities to address environmental health impacts from proposed projects in communities. For environmental justice communities, the rollback of this important policy would eliminate protections and tools needed to address the deadly impacts of air pollution, climate change, and unsustainable developments in their communities.

NEPA sets federal standards for environmental review and community engagement and informed decision-making. Passed by an overwhelming bipartisan majority and signed into law in 1970, NEPA has empowered the public and demanded government accountability for more than 40 years. NEPA is democratic at its core. NEPA provides communities with an opportunity to learn about the actions federal agencies are proposing, while also offering agencies an opportunity to receive valuable input from the public. Informed public engagement often produces ideas, information, and even solutions that the government might otherwise overlook. NEPA leads to better decisions—and better outcomes—for everyone. The NEPA process has saved money, time, lives, historical sites, endangered species, and public lands while encouraging compromise and cultivating better projects with more public support. Environmental justice communities rely on NEPA to ensure community input into decision-making about projects. Without NEPA, these communities lose authority and opportunity to engage in the decision making over projects that directly impact their lives.

On behalf of the Moving Forward Network, we urge you and your colleagues to protect people, protect the environment and protect NEPA in its entirety.

Sincerely,

ANGELO LOGAN,
Campaign Director.

NATIONAL PARKS CONSERVATION ASSOCIATION,
WASHINGTON, DC

April 24, 2018

Dear Representative:

Since 1919, National Parks Conservation Association (NPCA) has been the leading voice of the American people in protecting and enhancing our National Park System. On behalf of our more than 1.3 million members and supporters nationwide, I write in support of the National Environmental Policy Act (NEPA), an essential law guiding responsible development and public engagement in our nation's project planning. We hope you will consider our views as you discuss NEPA during the Wednesday, April 25th hearing in the House Natural Resources Committee.

The National Park System is no stranger to the need for infrastructure repairs and speedy project permitting and approval. Both parties recognize that there isn't a single community in the country that isn't struggling with decaying roads, bridges, water systems, schools and more. National parks are a microcosm of this larger national need. Unfortunately, NEPA has been caught undeservingly in the crossfire in the debate on infrastructure development. Many proposals in Congress and from the administration support project development at the expense of project analysis and public involvement, while undermining bedrock environmental laws such as the NEPA, Clean Water Act and Clean Air Act, under the mistaken belief that they are the source of project delays. In reality, infrastructure needs, both current and future, are resources starved, not burdened by environmental review.

Furthermore, NEPA ensures communities are informed about significant health and environmental impacts from any proposed federal development project, requires that federal agencies measure the environmental impacts of any proposed actions, and allows the public to comment on these plans. Successful uses of NEPA have resulted in sound restoration and mitigation of potential impacts to our national parks, public lands and the plants and animals that call these places home.

As noted above, in an attempt to modify the law, the 115th Congress has introduced over 60 pieces of legislation that would minimize the involvement of stakeholders, federal agencies and the public at the expense of nature, wildlife and community health. We're concerned that many of these efforts are solutions in search of a problem with NEPA. Some of these bills would accelerate development and waive NEPA via legislative categorical exclusions and reduce government accountability to the public through limiting judicial review, all in the name of expediency—even though the facts demonstrate that permitting isn't the primary hurdle to project execution.

We agree that there may be ways to modernize NEPA, but we encourage you to only do so to foster better public input, improve transparency and ensure taxpayer dollars are spent on robust decisions that protect our environment, public lands and public health.

Finally, we understand that the committee may have concerns with issues at Point Reyes National Seashore, as raised by Dr. Laura Alice Watt in her testimony submitted to the committee. NPCA, along with other conservation organizations, is proud to be working directly with ranchers within the Seashore to promote exchanges amongst diverse stakeholders and help produce a plan through the NEPA process that builds resiliency for environmentally sustainable ranching, recreation, wildlife and other resources in this park that attracts more than 2 million visitors each year. Regarding the aforementioned testimony submitted by Dr. Watt, who is part of a secretive organization called "Resilient Agriculture Group," we are concerned it lacks credibility on this topic and contains factual inaccuracies. Importantly, Dr. Watt is not a rancher at the Seashore and does not speak for or represent the ranchers. In fact, ranchers within the Seashore have concerns that the efforts of Dr. Watt and Resilient Ag Group are unproductive and do not match the reality on the ground (see attached Letters to the Editor in the *Point Reyes Light*).

These letters not only undermine Dr. Watt's arguments, they demonstrate that ranchers leasing land from the Seashore support NEPA and the National Park Service. Noteworthy are their comments, such as, "We are proud to be a part of this [NEPA] process and trust our park service to understand not only the cultural and historical significance of ranching in the park, but also how our activities contribute ecological management services and enhanced ecosystems for our varied wildlife"; and "We understand the value and importance of this planning process, and have positive and mutually respectful relations with National Park Service staff. We expect to work constructively with N.P.S. throughout the current planning process and beyond. . . . The process can build mutual trust and consensus with different stakeholders and increase public confidence in the management of the seashore."

We will continue to work with local communities on these issues and ensure that both ranching families in the Seashore and NPS are able to support their respective missions. Please let us know if you have questions about the work at the Seashore.

Thank you for considering our views. For further information, please feel free to contact me at (202) 454-3391 or akameenui@npca.org.

Sincerely,

ANI KAME'ENUI,
Director of Legislation & Policy.

Point Reyes Light 4/12/18 Letters

Working with the park

As ranchers in the Point Reyes National Seashore whose lives will be deeply affected by the ongoing general management plan amendment, we feel the need to step out of our comfort zone and make our views on the planning process clear. It is too important of a topic for us to remain silent. We want it to be known that we are in alignment with David Evans and Claire Herminjard's comments they made in a letter to the Light last week.

We understand the value and importance of this planning process, and have positive and mutually respectful relations with National Park Service staff. We expect to work constructively with N.P.S. throughout the current planning process and beyond. We are actively engaged in the G.M.P.A. planning process and believe that through this work we can find solutions to various concerns affecting different stakeholders. Some topics at hand are complex and require the thoughtful approach established by the public planning process before us. The process can build mutual trust and consensus with different stakeholders and increase public confidence in the management of the seashore.

We believe promoting exchanges between environmentalists, ranchers and the N.P.S. will lead to a better understanding of the issues around ranching and the environment in the seashore—resulting in a G.M.P.A. that will help the seashore become a model for productive agriculture on public lands throughout the United States, a long-term benefit for all.

**Bill and Nicolette Niman;
Bob and Ruth McClure;
Dan and Dolores Evans;
Julie Rossotti;
Betty Nunes;
Bob Giacomini;
and Tim, Tom and Mike Kehoe**
Point Reyes National Seashore

A moderate rancher voice

As current ranchers and leaseholders in the Point Reyes National Seashore, we feel the need to express our desire for a peaceful planning process that embraces cooperation with the National Park Service, our local environmental groups and the greater public with the goal of seeing a General Management Plan update that provides for optimal public use of our national park as well as long-term leases for the ranching families who steward these lands. We are proud to be a part of this process and trust our park service to understand not only the cultural and historical signifi-

cance of ranching in the park, but also how our activities contribute ecological management services and enhanced ecosystems for our varied wildlife.

We also feel the strong need to express our concern over recent activities by the newly formed Resilient Agriculture Group. We understand that these may be well-intentioned citizens and fellow ranchers and we appreciate their support of ranching in the seashore. That said, we are deeply concerned by their methods for expressing their support and believe their contentious actions are wholly counter-productive to completing the management plan update and securing long-term leases for ranchers.

Additionally, it is critical for us to note that often in the media, the Point Reyes ranchers are lumped together as having one viewpoint. This is simply not the case, and a rather narrow scope of reporting. We, among several of our ranching peers, are not supportive of antagonistic tactics, such as those used by RAG, but rather trust in the park service process. We are also highly concerned that the Point Reyes Seashore Ranchers Association tends to have one voice in the media—that of Kevin Lunny. While we respect Mr. Lunny's right to his views, neither he nor the ranchers association speak for all ranchers.

We are here to say that we hope the voice of the moderate rancher rings true through this process and that the park service, the general public and our community does not let the cry of conflict be the only echo in the chamber. To emphasize, we, as a ranching family on Point Reyes, support the park in their efforts to complete a fair and comprehensive general management plan update and look forward to proactively participating in any way we can in that due process.

David Evans and Claire Herminjard
Point Reyes National Seashore

[LIST OF DOCUMENTS SUBMITTED FOR THE RECORD RETAINED IN THE
COMMITTEE'S OFFICIAL FILES]

Rep. Westerman Submission

—Article submitted for the record: Chadwick Dearing Oliver, Nedal T. Nassar, Bruce R. Lippke & James B. McCarter (2014) Carbon, Fossil Fuel, and Biodiversity Mitigation with Wood and Forests, *Journal of Sustainable Forestry*, 33:3, 248–275, DOI: 10.1080/10549811.2013.839386.

